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# WASHINGTON REPORTS

VOL. 57

CASES DETERMINED

IN THE

# SUPREME COURT

OF

# WASHINGTON

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JANUARY 17, 1910—MARCH 28, 1910

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ARTHUR REMINGTON
REPORTER

BANCROFT-WHITNEY CO.
LAW PUBLISHERS AND LAW BOOK SELLERS
SEATTLE AND SAN FRANCISCO.
1910

# OFFICIAL REPORT

Published Pursuant to Laws of Washington, 1905, page 330
Under the personal supervision of the Reporter

NOV 4 1910

PRINTED, ELECTROTYPED AND BOUND
BY
E. L. BOARDMAN, PUBLIC PRINTER

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OF THE

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DURING THE PERIOD COVERED IN THIS VOLUME

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## ERRATA

Page 271, line 8 from bottom, for ch. 283 read ch. 238

## ERRORS NOTED IN PREVIOUS VOLUMES

### VOLUME 43

Page 627, 2d syllabus, line 1, for § 745 read § 821

Page 631, line 3 from bottom, for § 5096, read § 5095, and for § 745 read § 821

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 8265. Department One. January 17, 1910.]

LEWIS & WILEY, INCORPORATED, *Appellant*, v. J. H. COOK *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—STIPULATION OF OWNERS—ESTOPPEL. A property owner, petitioning for the improvement of streets on certain conditions being performed, is not bound by his stipulation agreeing to a certain assessment upon his lots, or estopped from questioning the validity of the assessment, where it appears that the city did not perform the stipulated conditions but levied the assessments in entire disregard of the stipulation.

Appeal from a judgment of the superior court for King county, Main, J., entered August 17, 1909, in favor of the defendants, upon sustaining a demurrer to the complaint, in an action to enjoin the prosecution of an action for the cancellation of assessments for street improvements. Affirmed.

*Leander T. Turner* and *O. B. Thorgrimson*, for appellant.

*Charles A. Riddle*, for respondents.

FULLERTON, J.—In the summer of 1905 certain persons, representing themselves to be the owners of a majority of the property abutting upon certain streets in the city of Seattle, petitioned the board of public works of that city to improve the streets named in the petition in one general system of improvement, by establishing new grade lines thereon

[1]Reported in 106 Pac. 198.

and grading and regrading the streets so as to make them conform thereto. The petition contained certain reservations and stipulations, intended for the benefit of the petitioners as property owners, which the laws then in force governing the methods and procedure for the improvement of streets did not give them, among which were the following:

"First: That the undersigned, in signing this petition, hereby expressly reserve the right to claim a just compensation for the damages to their property caused by the grading and regrading of the streets embraced in the district, but agree, notwithstanding that damages may be so awarded, to pay not to exceed a cost of six dollars ($6) for each front foot (as defined by the city charter) chargeable to the abutting property so damaged, provided, however, that the limit of assessment of $6 shall not apply to the property within said district not damaged, which said property shall be assessed according to special benefits arising by reason of said improvement; provided, further, that the contract price of such grading and regrading on the streets and avenues in said improvement described shall not exceed fifteen cents per cubic yard for fill and ten cents per cubic yard for excavation.

"Second: That the city of Seattle, in entering into a contract for the performance of said improvement, shall insert therein a provision for and on behalf of any owner of property within the limits of the district as set forth above, who may desire the same to be excavated or filled to an even grade with the streets abutting the same at the time that said streets are graded or regraded, and at the price bid by said contractor for the excavation and filling of the streets embraced in said district; provided, that where private property is to be filled, the owner may require that said property be not filled above a specified height for the construction of a basement therein.

"Third: That the undersigned do hereby severally stipulate that all private property belonging to them within the limits of the said district may be excavated or filled by said contractor as hereinabove provided, and they do further severally agree, upon demand of said contractor, after the execution of the contract between said contractor and the city, to enter into a written contract with said contractor for the performance of said excavation or filling, as may be required

by the owner, at the prices bid by said contractor per cubic yard for the grading of the streets embraced in this district; provided; that said contractor shall accept in full satisfaction for such excavation or filling of said private property a lien against said private property, payable at the option of the owner of said private property, in cash, upon monthly estimates made in general conformity with the monthly estimates made upon the streets abutting said property, or the said owner may elect to pay for said improvement at the expiration of five or ten years after the completion and acceptance of the work by the Board of Public Works, with interest thereon at the rate of seven per cent (7%) per annum, interest payable annually."

After the filing of the petition, the city council by ordinance established new grades on the streets mentioned, adopted plans and specifications for their improvement, and directed the corporation counsel to begin proceedings to condemn such property as it would be necessary to take or damage in making the improvements. Such an action was begun and prosecuted to a judgment and decree, in which such property as it was found necessary to take or damage in constructing the improvement was condemned, and the just compensation to be paid the owners of the property so taken or damaged fixed and determined. The city thereupon paid the awards, and by ordinance established a local improvement district comprised of the territory "abutting, adjacent or proximate" to the streets on which the new grade lines were established, and directed that the same be improved in accordance with such grade lines, and that the cost thereof, less a certain sum appropriated from the general fund, be paid by an assessment upon the property which should be found to be benefited by the improvement. That part of the ordinance directing the improvement to be made and providing for an assessment to pay the costs thereof was in the following words:

"That [the streets in the assessment district] be improved, by grading and regrading the same, and by the construction of the necessary bulkheads and retaining walls and by the

construction of such temporary sewers, and the alteration, removal and reconstruction of the existing sewer system, as may be rendered necessary by the grading and regrading of said streets, avenues and approaches. Said improvement to be made in accordance with the stipulation and agreement contained in the property owners' majority petition therefor, being file No. 28,822 of the records of the city of Seattle, in the office of the comptroller of said city.

"Said improvement to be made according to the plans and specifications prepared under the direction of the city engineer, and on file in the office of the department of public works; and that assessments be levied and collected upon all lots and parcels of land specially benefited by said improvement to defray the cost and expense thereof over and above the amount herein appropriated out of the general fund and local improvement district bonds be issued as hereinafter provided, and said assessment shall become a first lien upon all the property liable therefor, and for the payment of all local improvement district bonds as hereinafter provided." Ordinance, Seattle, No. 13,309.

Acting pursuant to the authority and direction of this ordinance, the board of public works entered into a contract in writing with the appellant to perform the required work, inserting in the writing all of the conditions contained in the landowner's petition filed with the board of public works. The contractor thereupon began the performance of the work, and while prosecuting it entered into a contract with the respondents to excavate lot two in block six, owned by the respondents, agreeing to bring the level thereof to an even grade with the street on which it abutted, at the rate per cubic yard allowed for like work in the appellant's contract with the city, namely, at ten cents per cubic yard for all earth excavated and removed. The contract contained the following recital:

"That, whereas, the said contractor heretofore under date of the sixth day of April, A. D. 1907, entered into a certain contract with the city of Seattle for the improvement of Jackson street and other streets and places in the said city of Seattle, as ordered by ordinance No. 13,309, approved

February 9, 1906, in accordance with certain plans, specifications and stipulations set forth and referred to in the said contract, and the said owner desires to and does hereby ratify and adopt the action of said city in making said contract, and desires to obtain the benefit of the provisions inserted in the said contract for and on behalf of the said owner of the property hereinafter described, situated within the limits of the district to be improved by said ordinance."

At the initiation of the improvement proceedings, the property so graded was owned by one Gerald Frink. Frink signed the petition asking for the improvement filed with the board of public works. He was the owner of the property, also, at the time the condemnation proceedings were brought by the city attorney, and received the award made by the jury in that proceeding, the jury finding that the property would be damaged by the improvement of the streets, over and above all benefits it would receive thereby, in the sum of $1. Prior to the time the actual work on the street began, however, he conveyed all his interests to the respondents in this action. The lot in question had a street frontage of 97.2 feet. To pay the cost of the improvement of the street it was assessed by the city in the sum of $865, or at the rate of $8.90 (nearly) per front foot.

The respondents conceived themselves aggrieved by this assessment, and brought an action against the city of Seattle to cancel the same, alleging as grounds therefor that the benefits accruing to the property by reason of the improvement had been offset by the jury against the damages caused the property by the improvement. While that action was pending, the present action was begun by the appellant to enjoin the cancellation of the assessment for any greater sum than the excess thereof over six dollars per front foot; the claim being that respondents were estopped by reason of their acts, and the acts of their immediate grantor, from asserting that the property was not liable to an assessment of six dollars per front foot.

To its complaint, which embodied the foregoing facts, and

the further facts that the appellant is the contractor who made the street improvement, that the only means by which it can be reimbursed for its labor and advancements is by the assessments made upon the property abutting upon the improvement, and that it will suffer an irreparable loss if a cancellation of this assessment is allowed in a greater sum than the excess of six dollars per front foot, a demurrer was interposed, and sustained by the court. The appellant elected to stand on its complaint, whereupon its action was dismissed, and a judgment for costs entered against it. This appeal was thereupon taken.

No question is made as to the form of the proceeding by counsel for the respondents, and, for that reason, we ourselves will not question it. We do not wish to be understood, however, as committing ourselves to the doctrine that one action of equitable cognizance will lie to restrain the prosecution of another.

On the merits of the controversy, the contention of the appellant is simple. It is thought that the respondents are estopped to deny the validity of the assessment upon their property up to the amount of six dollars per front foot, because their predecessor in interest petitioned the city to make the improvement agreeing to permit an assessment on the property at the rate of six dollars per front foot, on certain conditions being performed, and that the respondents, as his successor in interest, took advantage of one of the conditions to procure the grading of the lot at a low rate. But it is manifest, from a comparison of the petition asking for the improvement and the ordinances of the city passed authorizing the same, that the city, when it ordered the improvement, paid but little heed to any of the limitations contained in the petition, and especially none to those which were intended for the actual benefit of the petitioners. The conditions that would benefit the petitioners, it will be observed, not only limited the amount of the assessment on lots damaged in excess of benefit to $6 per front foot, but provided,

in effect, that such lots should not be assessed in any sum unless the amounts that could be assessed on lots for actual benefits should not equal the cost of the improvement. This stipulation was entirely disregarded. The property in the assessment district was all assessed alike, without distinction between that which could be lawfully assessed for actual benefits, and that which could only be assessed under the stipulation. Whether the property actually benefited was assessed for the full amount of the benefits it received does not appear, and hence it does not appear whether the respondents' property is liable to assessment in any sum, much less does it appear that it is liable to an assessment of $6 per front foot. The respondents, therefore, are not estopped from questioning the validity of the assessment on their property by any act of their own or their predecessor in interest, and the present action is without merit.

The case is not altered by the fact that the stipulations contained in the petition were inserted in the appellant's contract with the city. The only provision applicable to the contractor was the second one above mentioned, relating to the price to be charged for excavating and filling private property, and this was a condition the city has the right to insert in any contract regardless of any agreement on the part of the property holders.

The judgment is affirmed.

RUDKIN, C. J., GOSE, and CHADWICK, JJ., concur.

[No. 8307. Department One. January 17, 1910.]

# CHARLES HARRIS, *Respondent*, v. BROWN'S BAY LOGGING COMPANY, *Appellant*.[1]

RAILROADS—OBSTRUCTIONS NEAR TRACK—NEGLIGENCE—EVIDENCE—SUFFICIENCY. It is actionable negligence to knowingly leave a skid, used for loading a donkey engine, so near the tracks of a logging railway that it was liable to be struck by a train of logs passing while men were working at the place and liable to be struck by the skid.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE — APPARENT DANGERS—QUESTION FOR JURY. A section hand is not guilty of contributory negligence, as a matter of law, and does not have equal knowledge with the company as to the liability of a train of cars to strike a skid used to load a donkey engine and left near the track, where he testified that he did not know of the fact, he had worked for the company but a few hours, and knew nothing of the manner in which logs were loaded on the cars, while the foreman knew that it was liable to be struck by logs, although the engine could pass in safety.

MASTER AND SERVANT—SAFE PLACE—DUTY OF MASTER—INSTRUCTIONS. An instruction that the master owes the "positive" duty to provide its employees with a reasonably safe place to work is not objectionable as making the master an insurer.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OBVIOUS DANGERS—INSTRUCTIONS. Where the contributory negligence of a new section hand depended upon whether he had knowledge or might have known that a skid near the track was liable to be struck by a passing logging train, a fact known to the company, it is within the issues and proper to give an instruction as to the duties of the parties where they do not stand upon an equal footing as to the obvious or apparent dangers.

SAME—TRIAL—REQUEST FOR INSTRUCTIONS. An objection that an instruction as to the duties of a master where he and the servant do not stand upon an equal footing is misleading in not further instructing that there can be no recovery if both are equally ignorant of a danger, can only be made where there was a request for the further instruction.

DAMAGES—FUTURE PAIN AND SUFFERING. An instruction authorizing a recovery for such suffering and pain as the jury think prob-

[1]Reported in 106 Pac. 152.

able from the testimony he would experience in the future, is not erroneous as failing to limit the recovery thereof to the damages which it is reasonably certain he will suffer.

TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse to give requested instructions covered in the general charge.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 15, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a section hand on a logging railroad. Affirmed.

*Blattner & Heasty, L. F. Chester,* and *L. B. da Ponte,* for appellant.

*R. B. Brown* (*Allan Brant,* of counsel), for respondent.

FULLERTON, J.—The respondent brought this action against the appellant for personal injuries. He had a verdict and judgment in the court below, and this appeal is taken therefrom.

The record discloses that the appellant is engaged in the logging business, and as a part of its equipment owns and operates a logging railway. On April 5, 1908, it employed the respondent to work on its railway as a section hand, instructing him to perform such work as he should be directed to perform by the section foreman. He was put to work by the foreman on the day of the accident shoveling the accumulated dirt and debris from a place on the track in front of an abandoned landing, the purpose being to clear the space around the ties at that point so that the track could be moved and thus straightened. While he was so at work a locomotive with a car attached came over the track to the landing for the purpose of carrying away a donkey engine which stood or was shortly thereafter brought to the foot of the landing. To facilitate loading the donkey engine, two skids were laid on the landing at right angles to the track, parallel to each other, and some eighteen or twenty feet apart. They were about thirty feet in length and so placed

that the ends next the track protruded beyond the landing to within a few inches of the edge of the car. The donkey engine was then hauled or "skidded" along the skids onto the car. After loading, the engine pulled away, leaving the skids as they were originally placed. The respondent and his companions then resumed work in front of the landing until the noon hour, when they went to dinner. Coming back from dinner, they resumed work at the same place, and while so at work a warning was given of the approach of a train loaded with logs, and the respondent, with others of the crew, climbed up onto the landing to escape the train, he taking a position between the skids some fifteen feet back from the track, and within four or five feet from the skid farthest away from the approaching train, where he turned and stood looking at the train as it was passing. On one of the trucks, possibly the third one from the engine, a log was left projecting over the edge of the truck. This log struck the skid near which the respondent was standing, throwing the end struck forward and the other end backward. The end as it was thrown backward struck the respondent, crushing his leg.

The appellant first contends that no actionable negligence on its part is shown, but we think this contention hardly tenable. The negligence consisted in placing the skids so near the track that they could be struck by a passing train, putting the respondent to work on the track in front of them, and then running a train down upon him, knowing that he was liable to move between the skids in getting out of the way of the train, without warning him of the danger of so doing. The accident was not what the law calls an unforeseen accident. On the contrary, the testimony of the appellant's foreman makes it clear that he foresaw the possibility of a log on the train striking the skids. In fact, he testifies that he saw that the skids were far enough back to allow the engine to clear, and anticipated no trouble from a log striking them, as they would merely be pushed out of the way without danger of derailing the train or causing it to lose

its load of logs. Since, therefore, the appellant knew the skids were liable to be struck by a train loaded with logs, it was bound to anticipate danger to its employees if they stood between or near the skids when a trainload of logs was passing, and the accident was one that could have been foreseen by the exercise of ordinary care, rather than incapable of being foreseen.

As its second ground of error, the appellant contends that the respondent had equal knowledge with the appellant of the existence of the danger to which he exposed himself, and consequently took the risk of injury upon himself. But the premise here assumed is contrary to the facts, as we read the record. It is true that the respondent had the opportunity of knowing, and could have known, had he looked, how far the skids projected beyond the edge of the abandoned landing, but whether he knew or ought to have known that the loaded cars were likely to strike them is a disputed question in the record. He himself says that he did not know they were likely to be struck, and the record does not make the contrary so apparent that the court is required to say, as a matter of law, that he should have known. He had worked for the appellant only a few hours before the accident, and, so far as it appears, knew nothing of the manner in which the logs were loaded on the cars, or how far they would be likely to project beyond the edge of the car trucks. At best, therefore, the question whether the respondent was guilty of contributory negligence in standing in the place he did stand, was for the jury.

To sustain this contention, the appellant cites and quotes largely from the case of *Anderson v. Inland Telephone etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410, but the cases are not parallel. In that case an employee of the telephone company was injured by coming in contact with a guy wire which formed a part of the equipment of an electric railway company operating an electric railway along the street on which the telephone company's wires were stretched. The

guy wire had become charged with electricity from the railway company's operating wire through a defective insulator. The injured employee was himself an electrician, or at least knew the hazards of the business in which he was engaged, and was provided with instruments for detecting stray currents, by the use of which he was expected to look out for his own safety. It was properly held on these facts that, as between himself and his employer, the servant assumed the risk of injury from stray currents of electricity. But in the case at bar, the burden was not on the respondent to look out for the safety of the place in which he was required to work. This duty was on the appellant, and when the respondent took a place beside the track, safe from any injury likely to be received from the passing train, he had a right to rely on the presumption that the place in which he stood was safe from dangers of which he knew nothing, and of which no warning had been given him. The distinction between the cases lies in the fact that in the one case the injury did not arise from the fault of the master, while in the other the injury was the direct result of such fault.

The court charged the jury that "the master owes the positive duty to an employee to provide him with a reasonably safe place in which to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe . . ." The objection is to the word positive. It is said that it in effect makes the master an insurer of the safety of the place, while the rule is that the master is only required to exercise reasonable care and diligence in his performance of this duty. But we think the appellant has given the word a meaning it does not have in the connection in which it is here used. It will be noticed that the adjective qualifies the noun "duty," and is used rather as the antithesis of the word "delegable," than as a measure of the diligence required of a master in his effort to comply with the requirements of the rule—it being meant to assert that the master could not relieve himself of liability for the non-

performance of the duty of furnishing his servant with a safe place in which to work by delegating that duty to another. But, however this may be, that this is a correct statement of the rule has been repeatedly announced by this court. *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Ogle v. Jones*, 16 Wash. 319, 47 Pac. 747; *Shannon v. Consolidated Tiger & Poorman Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Czarecki v. Seattle & S. F. R. & Nav. Co.*, 30 Wash. 288, 70 Pac. 750; *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814. The rule is also stated in this form in 26 Cyc. 1104. There was therefore no error in the instruction.

The court further charged the jury as follows:

"When the parties do not stand upon an equal footing; that is, where the danger of the place is not obvious and apparent to the servant, or, by the exercise of ordinary care and prudence on his part, would not have become apparent, then the servant has a right to assume that the master has furnished him with a safe place in which to work. But where the dangers incident to the employment are alike open and obvious to the master and servant, or, by the exercise of ordinary care and prudence could have been seen and noticed by the servant, then the parties are upon an equality, and the servant assumes the risk, and the master is not liable for the injury to the servant resulting therefrom."

It is objected to this instruction that it submits an issue not raised by the evidence, and is misleading because it fails to inform the jury that there can be no recovery where both master and servant are equally ignorant of the defects or dangers causing the injury to the servant. Neither of these objections are tenable. As we read the record, one of the principal questions at issue was whether or not the dangers of the place in which the respondent stood was as apparent to him as it was to his employer, and, this being so, it was, of course, proper to give the jury an instruction upon the question. That the instruction given correctly states the law,

there can be no doubt. The second objection misconceives the rule. An instruction, correct as far as it goes, is not erroneous because too general in its terms, or because it omits matters that might properly be connected with it. The remedy in instances of this kind is to request a more complete or specific instruction.

"The rule as to nondirection is altogether different from that just stated [misdirection]; for while it is the duty of the court to give instructions requested which are correctly drawn and applicable, and which are seasonably presented, it is a general rule in both civil and criminal cases, . . . that mere nondirection, in the absence of request, does not constitute error." 11 Ency. Plead. & Prac., 217.

See, also, *Duteau v. Seattle Elec. Co.*, 45 Wash. 418, 88 Pac. 755.

The court also charged the jury as follows:

"Now, gentlemen, if you find in favor of the plaintiff you will assess such damages, as in your judgment, will actually compensate him for his impaired earning capacity, his suffering and pain which he has undergone, and which you think probable from the testimony he will experience in the future, not exceeding $7,500."

The objection to this instruction that it permits the jury to indulge in speculation and conjecture as to the damages the respondent may suffer in the future on account of pain and diminished earning capacity, whereas the true rule is that he can only recover such damages as it is reasonably certain he will suffer in the future by reason of pain and diminished earning capacity. The case of *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916, is cited as maintaining this contention. In that case we did hold that it was reversible error to instruct the jury that the plaintiff can recover for such pain and suffering as the jury should find "he may suffer in future" because of his injuries, saying that the true rule is the rule the appellant contends for in this case. But we did not mean by the holding in that case that no other form of expression than the one there used could correctly convey to the jury the idea

intended to be conveyed. This is evidenced by the fact that the cases of *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978, and *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869, were cited and distinguished from the case then at bar on the ground that the modifying language of the instructions in these cases were sufficient to bring the instructions within the rule. In the first of these cases the instruction was in almost the exact language of the instruction in the case at bar, and it was held, on both reason and authority, that the instruction satisfied the rule. In the second case the language used was that the jury in awarding damages to the plaintiff "might take into account the pain and suffering the respondent had endured and may endure as the ordinary and actual result, and as a consequence of the injury sustained." The language of the instruction complained of in the case at bar is as definite as the language used in the instruction in these cases, and we hold it free from error.

Certain instructions were requested by the appellant which we do not find necessary to notice specifically. In so far as they were material, they were substantially included in the charge of the court. This was sufficient. In this state it is not error to refuse to give verbatim a requested instruction, even though the instruction requested may be pertinent and couched in proper language; it is sufficient for the court to give the request in substance.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8121. Department One. January 17, 1910.]

# HERMAN BARTELT, *Respondent*, v. OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*.[1]

CARRIERS—OF LIVE STOCK—NEGLIGENCE—BURDEN OF PROOF. Where the shipper of live stock accompanies the same, the burden is upon him to prove negligence in transit resulting in injury to the stock.

SAME—CONTRACT—CONDITIONS—EXEMPTION FROM LIABILITY. The agreement of a shipper of live stock to unload, load, feed, water and care for the stock in transit, is binding upon him, but does not exempt the carrier from liability for any negligent act in transporting the stock; nor could it do so by contract.

SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence in the operation of a train, and that the same resulted in injury to live stock shipped thereon, where it appears that two car loads of young mares were properly loaded, the number in each car was consistent with proper handling, that they were unloaded and fed and reloaded in good condition at U., after which the cars were chugged and jammed nearly all the way, the conductor stating that the engine was overloaded, that the cars were jammed in switching, horses being thrown to the floor, and at the end of the journey one of them was found to have a dislocated shoulder, another a dislocated hip, and two had slipped their foals; although the evidence as to the rough handling of the train was conflicting.

SAME—NEGLIGENCE—EVIDENCE. The carrier of live stock accepting mares for shipment is chargeable with notice that they are heavy in foal.

PLEADING—VARIANCE—WAIVER—CARRIERS. It is not a fatal variance that the pleading alleged an implied contract to carry and deliver live stock as at common law, and the proof showed a special contract by bill of lading, where the proof was admitted without objection.

CARRIERS—OF LIVE STOCK—ACTION FOR NEGLIGENCE—FORM—PLEADING—IMMATERIAL VARIANCE. A common law action against a carrier of live stock for negligent acts in the operation of the train resulting in injury to the stock is maintainable irrespective of the special contract of carriage; so that a variance as to the contract would be immaterial where the issue raised and tried was as to the negligence of the company in operating the train.

[1]Reported in 106 Pac. 487.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 23, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action of tort. Affirmed.

*W. W. Cotton, Samuel R. Stern*, and *W. A. Robbins*, for appellant.

*John L. Dirks*, for respondent.

Gose, J.—This is a suit to recover damages from a common carrier for injuries to live stock, resulting from its alleged negligence. The dereliction charged is that the appellant, in violation of its duty as a common carrier, so negligently and carelessly operated its cars that certain brood mares were bruised, injured, and maimed, while being transported over its road, in the month of November, 1907. The appellant joined issue upon the charge of negligence, and alleged affirmatively that it transported two carloads of vicious, wild, and unruly horses for the respondent, from Huntington, Oregon, to Fairfield, Washington, upon the terms of a limited liability live stock contract and at a reduced rate, the material stipulations of the contract being:

"In consideration of the special reduced rate herein provided for the transportation of the live stock above described, it is hereby stipulated and agreed as follows: . . .

"(3) The shipper agrees to load, unload and reload all said stock at his own expense and risk, and to feed, water and tend the same at his own expense and risk while it is in any stock yards, whether the same be operated, owned, or controlled by said carriers, or otherwise, and while in the cars or at feeding points or at any place where the same may be unloaded for any purpose whatever.

"(4) The shipper assumes . . . all risk of injury which said live stock or any of them may receive in consequence of any of them being wild, unruly, weak, maiming each other, or themselves by or in consequence of heat or suffocation or any other ill effects of being crowded or injured. . . .

"(7) No carrier shall be liable for any loss or damage to said stock by causes beyond its control. . . ."

The reply denied that the horses were wild, vicious, or unruly, and denied that they were carried at a reduced rate. Upon the issues thus joined, the case was submitted to a jury, resulting in a verdict and judgment for the plaintiff, from which the defendant has appealed.

It is first urged that there is no evidence tending to show that the horses were injured through the appellant's negligence while in transit, and that the cause of the injury is speculative and conjectural. The respondent's agent accompanied the horses, and the burden was therefore on the respondent to prove that the injury occurred through the negligence of the appellant, and that it did not arise from a failure upon his part to perform the duties assumed by him in the contract of shipment. The obligation which he assumed, to load, unload, and water the stock and to care for them while in the stockyards, was legal and binding upon him. The appellant could not, however, exempt itself from liability for any negligent act in transporting the horses, nor did it undertake to do so. These propositions are well settled. *Lewis v. Pennsylvania R. Co.*, 70 N. J. L. 132, 56 Atl. 128; *Terre Haute etc. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 32 Am. St. 239, 17 L. R. A. 339; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. St. 577, 13 Atl. 324, 4 Am. St. 670; *Normile v. Oregon Nav. Co.*, 41 Ore. 177, 69 Pac. 928; *Baltimore etc R. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106; 5 Am. & Eng. Ency. Law (2d ed.), 308; *Hance v. Pacific Express Co.*, 66 Mo. App. 486; *St. Louis etc. R. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534; *Peterson v. Chicago M. & St. P. R. Co.*, 19 S. D. 122, 102 N. W. 595. The court's instructions were in harmony with this view of the law. In holding that the burden is on the respondent to prove that the injury resulted from the negligence of the appellant, we do not intend to modify the rule expressed in *Jolliffe v. Northern Pac. R. Co.*, 52 Wash. 433, 100 Pac. 977, where the injury to the live stock resulted from an unusual delay in the

shipment on the part of the carrier, when the cause of the delay was known to the carrier and unknown to the shipper.

Respecting the sufficiency of the evidence to support the verdict on the question of the negligence of the appellant, the admitted facts are, that the appellant received from the respondent at Huntington, Oregon, for shipment to Fairfield, Washington, two carloads of horses, consisting of forty-five young, grade Percheron mares, and two saddle horses; that there were twenty-four head in one car and twenty-three head in the other; that from Umatilla to Riparia the train comprised one engine, fifty loaded cars, fourteen empty cars and a caboose; that when the horses were taken from the cars at Fairfield, one had a dislocated shoulder, another a dislocated hip, another a mashed foot, and three of the mares had slipped their foals. Evidence was submitted to the jury which tended to show that the horses were properly loaded and that the number placed in each car, considering the size of the horses, was consistent with prudent handling; that the horses were unloaded and fed at Umatilla and reloaded in good condition; that after leaving that point, along the Snake river, the cars were chugged and jammed, as a witness expressed it "most all the way along;" that the attendant inquired of the conductor the cause of the rough handling of the cars, and the latter informed him that the engine was overloaded, that it had too many cars, causing the engine to slip and the cars to jerk; that at Riparia the train was switched about the yards and jammed against other cars, for a period of about two hours and until the attendant complained of the switching and jamming to the yard master, and demanded that the cars with the horses should be set out; that they were then placed upon a switch and permitted unattended to run against other cars, with such force that two of the horses were thrown to the floor of the car.

The appellant argues, however, that the mares were wild, range-raised, and heavy in foal, and that the injuries were occasioned by their natural propensities. There was evi-

dence tending to show that the mares were barn and pasture raised and gentle, although some of them were unbroken; that the line of the Southern Pacific railroad extended along one side of the inclosure where they had been pastured; that they were accustomed to and were not frightened by trains; that they had been bred late in the season and were not heavy in foal. The testimony as to the rough handling of the train along the river and in the yards at Riparia is conflicting, but there is ample evidence in the record, direct and circumstantial, to justify the jury in concluding that the injury was referable to the negligent operation of the train at both points.

It is further contended that the evidence shows that the mares were heavy in foal, and that in the absence of notice of this fact or of facts sufficient to charge the appellant with notice, this was a hidden defect, and that it can only be held to the exercise of reasonable care. The court instructed the jury that, if the injury resulted from the wild or vicious propensities of the horses or because they were worried, fretted, crowded or maimed themselves, or if the injury resulted from the mares being heavy in foal, there could be no recovery. The appellant was certainly not entitled to a more favorable instruction. Moreover, if the mares were heavy in foal, that fact was apparent to the carrier.

Finally, it is urged that,

"There is a fatal variance between the pleadings and the proof, in that plaintiff's complaint is an attempt to recover on an implied contract to carry and deliver as at common law, and plaintiff's own proof shows that the shipment moved under the terms of the special contract in evidence in this case, and that the alleged damage is within the terms of the special contract."

The bill of lading was admitted in evidence as a part of the cross-examination of one of the respondent's witnesses. At the close of the respondent's case the appellant moved for a nonsuit on two grounds, viz., (1) that there was no evidence tending to show negligence, and (2) that the injury was

due to the inherent vice of the animals. When all of the evidence had been submitted, defendant moved for a directed verdict, renewing the grounds stated in the former motion, and adding a third, viz., a variance between the pleading and the proof, in that a recovery was sought on the ground of common law negligence when the shipment was made under a written contract. The evidence was submitted without objection. Orderly procedure, as well as the due administration of justice, forbids that the appellant may proceed throughout the trial as though the issue were properly joined, and then seek to raise the question that the action should have been bottomed upon the written contract. *Asplund v. Mattson*, 15 Wash. 328, 46 Pac. 341; *Murray v. Meade*, 5 Wash. 693, 32 Pac. 780; *Fontenot v. Manuel*, 46 La. Ann. 1373, 16 South. 182; *Prenatt v. Runyon*, 12 Ind. 174. The contract, as we have seen, was *prima facie* legal and binding, and if there was no consideration for it in the way of a reduction in the rate, or in any other respect, the burden of proving such fact was on the respondent, and the court so charged the jury. The appellant was not, therefore, as it contends, precluded from raising the question until it had proved a consideration for the contract.

But, regardless of the question of waiver, the contract did not, and for reasons of public policy, could not, exempt the appellant from liability for its own negligent acts. If the injury to the horses occurred from the negligent operation of the train on which the horses were carried, a liability arose which was not covered by the contract, and an action predicated upon such negligence is maintainable. Our statute directs that the facts constituting the cause of action shall be stated in plain and concise language (Rem. & Bal. Code, § 258). The complaint alleges the delivery and acceptance of the horses for shipment, the negligent operation of the train, and the resultant injury. The issue and the method of trial would have been the same if the pleader had set forth the bill of lading *in haec verba*. The code, § 299 (Rem. & Bal.)

provides that no variance between the allegations in the pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Section 300 provides that, when the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. Section 301 provides that, when the cause of action to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof. Guided by these principles, it is as clear as the mathematical rules of addition and subtraction that the issue of negligence was clearly and sharply defined, and that no prejudice resulted to the appellant. If injury arose from the appellant's negligence, as the complaint charges, it was liable in damages. If it occurred through the negligent discharge of the duties assumed by the respondent, no cause of action existed. This view is concisely expressed by Justice Wolverton, in *Normile v. Oregon Nav. Co.*, *supra*, at page 181, in the following language:

"It is seldom that bills of lading showing the contractual and correlative relations and obligations of the carrier and shipper relative to the shipment are drafted with a view to changing or restricting all the common-law liabilities to which the carrier is subjected; and if any remain upon which an action may be founded and recovery had without coming in conflict with special limitations and restrictions, there exists no reason why the common-law action may not be maintained, notwithstanding the special contract."

The same rule was announced by the court of appeals for the eighth circuit, speaking through Justice Thayer, in *Southern Pac. Co. v. Arnett*, 111 Fed. 849, 852, where it is said:

"We are aware of no rule of law which requires a shipper who has made a special contract to declare upon it, when he contends that the carrier has been guilty of some neglect of

duty on account of which he is liable notwithstanding the provisions of the contract. A special contract, when exacted by a carrier, is a defensive weapon, to be made use of by the carrier when sued by the shipper for any alleged dereliction of duty against which it was designed to afford protection."

In 6 Cyc. 513, the opinion is expressed that this is the better rule.

We are aware that there are many cases which hold that the action must be brought on the written contract of shipment, but in view of the fact that the question is an open one in this jurisdiction, we have adopted the view which we think best harmonizes with the spirit of the code practice. A reading of the cases which hold the contrary view will, we apprehend, disclose the fact that judges of acknowledged ability have been guided by the old rules of pleading rather than the liberal rules of the reformed procedure.

The judgment will be affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ., concur.

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[No. 8404. Department One. January 18, 1910.]

GRACE W. BLOOM, *Respondent*, v. LYNN BLOOM, *Appellant*.[1]

DIVORCE — GROUNDS — INCOMPATIBILITY — PERSONAL INDIGNITIES — FINDINGS — SUFFICIENCY. A decree for a divorce, where the evidence is not brought up on appeal, is supported under a liberal construction of findings to the effect that the condition of the home life of the parties has been such as to cause an utter estrangement and loss of love and affection, without fault on the plaintiff's part, and that longer living together is a source of great mental worry and anguish to the plaintiff, and the parties can no longer live together; the same being in effect a finding of personal indignities rendering life burdensome.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered June 7, 1909, upon findings in favor of the plaintiff, in an action for divorce. Affirmed.

[1]Reported in 106 Pac. 197.

*Gordon Mackay*, for appellant.

*G. C. Israel*, for respondent.

CHADWICK, J.—The only question raised in this case is the sufficiency of the findings to support the decree. Two grounds for divorce were set up in the complaint; failure to support, and that the appellant has so conducted himself as to cause respondent great anguish of mind, humiliation, and shame, and that his conduct made it impossible for her to longer live with him as his wife, or to entertain any affection for him. Certain facts were pleaded which need not be repeated here. The case went to trial upon the complaint and answer, which was a general denial.

The point is made that the court did not find more than that the parties could not longer live together, and for that reason the case falls within the rule of *McDougall v. McDougall*, 5 Wash. 802, 32 Pac. 749; *Stanley v. Stanley*, 24 Wash. 460, 64 Pac. 732, and *Wheeler v. Wheeler*, 38 Wash. 491, 80 Pac. 762. It was held in each of these cases that a divorce would not be granted because it was improbable that the parties would again live together as husband and wife; yet, after all, a casual reading of the opinions will show that the cases were actually considered by this court and found to be without merit. In the first case it was said: "In this case, however, there is such an absolute want of proof to sustain the findings of the court that we feel compelled to interfere." In the second case, a demurrer had been interposed, and after holding this should have been sustained, the court said: "But, upon an examination of the evidence given at the trial, we are convinced plaintiff offered no substantial testimony to entitle him to a divorce." In the *Wheeler* case, the court found in so many words that "plaintiff and defendant cannot live together any longer as husband and wife." There was no finding of cruelty or anything that might suggest other statutory grounds. This court, notwithstanding, reviewed the evidence, saying: "We have gone very carefully through all the evidence and, without quoting it here, it is

enough to say that there is no evidence sufficient to support a finding of cruelty even though one had been made to that effect by the trial court." These cases show that, while a divorce will not be granted merely because the parties cannot live together, this court will not be bound by the findings or lack of findings, but will consider the case on its merits. The court made the following finding in this case:

"The court finds that for the past two years the condition of the home life of the plaintiff and defendant has been such as to cause an utter estrangement between the plaintiff and defendant and to cause the plaintiff to be bereft of all love and affection for the defendant and to cause her longer living and cohabiting with the defendant to be the source of great mental worry and anguish to her, and to make it impossible for the plaintiff and defendant in the judgment of the court to longer live together, and that the said estrangement has been without cause or fault on the part of the plaintiff and that the conditions existing in said household is such that the plaintiff and defendant should not be compelled to longer live together."

Appellant has not seen fit to bring the evidence to this court. Whilst we will not indulge the presumption that the evidence warranted further findings, we will give the finding a liberal construction, in determining whether it justifies the decree. When so construed the finding is sufficient. The court has said that the conduct of defendant was such as to cause plaintiff great anguish of mind, which is in effect a finding that she has suffered personal indignities rendering her life burdensome. While the practice of drawing full and explicit findings upon every issue is to be encouraged, there are cases where no interest would be thus served. The omission may be excused where the findings, although drawn with all the modesty chaste expression permits, would yet make a record that might stand to shame the victim of a hapless marriage.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8365. Department Two. January 18, 1910.]

JAMES T. CLIZER, *Respondent*, v. PHILLIP KRAUSS *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—CONTRACTS—FORFEITURE—NOTICE. A contract for the sale of land, in which time is of the essence, providing that the same shall be void if the vendee fails to make payments when due, cannot be rescinded by the vendor for default in a payment where, before notice of forfeiture was given, the vendee tendered more than the amount then due on the contract.

VENDOR AND PURCHASER—CONTRACT—FORFEITURE. The failure of a vendee to pay taxes and assessments upon the land is not ground for rescission by the vendor and forfeiture of the contract, in the absence of a statute making the tax the personal obligation of the vendor.

TAXATION—REAL PROPERTY—COLLECTION—PERSONAL LIABILITY. In this state, the owner is not personally liable for taxes assessed against his real property; the statutory method of enforcing the same as a lien being exclusive.

MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—PERSONAL LIABILITY. The owner is not personally liable for local improvement assessments upon his real property.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—TENDER—SUFFICIENCY. A tender of the amount due on a contract for the sale of land, in order to entitle the vendee to maintain an action for specific performance, need not include the amount due for taxes and assessments on the land agreed to be paid by the vendee, although the contract calls for a warranty deed; since the vendor is not liable for the same.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered April 30, 1909, upon findings in favor of the plaintiff, in an action for specific performance. Affirmed.

*L. H. Prather*, for appellants.

*M. C. King*, for respondent.

PARKER, J.—This is a suit for specific performance of a contract to purchase real property, prosecuted by the plain-

[1]Reported in 106 Pac. 145.

tiff, as assignee of the purchasers, against the owners, who are resisting the suit upon the ground that the rights of the purchasers and their assignee have been forfeited under the terms of the contract because of default in payment of installments of purchase price, as therein provided. A trial before the court resulted in a decree favorable to plaintiff, from which the defendants have appealed.

On July 17, 1907, the appellants, being the owners of the real property involved, entered into a written contract with Karl and Christian Grunich for the sale thereof to them for the agreed price of $2,252, payable, $400 cash; $100 January 1, 1908; $200 October 1, 1908; and the balance October 1, 1909; with privilege of paying additional sums not less than $100 at any time, and unpaid sums to draw interest at eight per cent per annum. It was also provided in the contract that the purchaser should pay all taxes and assessments imposed on the premises after the date of the contract, and further provided:

"It is expressly agreed that time is the essence of this contract, and in case of default by the parties of the second part, their heirs or assigns in any of the conditions above stipulated to be performed by them, then and in that case this contract shall become void and the parties of the second part shall have forfeited their rights hereunder, and any payments that shall have been made shall become forfeited to the parties of the first part, which payments it is specifically agreed, shall in that case be deemed as damages hereby liquidated for the nonperformance of this contract by said second parties."

The cash payment of $400 was made at the time of executing the contract, $67.87 was paid on January 7, 1908, and $100 was paid on May 28, 1908, no other payments having been accepted by appellants. On November 9, 1908, the purchasers assigned all their interest in the contract of purchase and the land therein described to the respondent. On November 10, 1908, the respondent, as assignee, tendered to appellants $881 to apply upon the purchase price, which

was refused; and on November 30, 1908, deposited that sum with the clerk of the court, at the same time filing his original complaint in this action, in which he alleged a tender of a note and mortgage for the balance due in addition to said $831, and prayed for specific performance.

On December 5, 1908, the allegation of the complaint as to the tendering of the note and mortgage was, on motion, stricken from the complaint; and thereafter, on December 10, 1908, respondent tendered to appellants the sum of $1,055 in addition to the $831 tendered and deposited with the clerk of the court, claiming these tenders amounted to the entire balance due upon the purchase price; and on December 19, 1908, filed his amended complaint after service thereof on appellants, alleging tender of the full amount due upon the contract to entitle him to a conveyance in pursuance of its terms. On March 2, 1909, before trial, respondent deposited with the clerk of the court the sum of $1,055 which had been tendered, and on March 6, 1909, as a further tender, he deposited with the clerk of the court the additional sum of $10.

It will be noticed the tendering and depositing of these sums all occurred before October 1, 1909, which was the date for the payment of the next and final installment after that of October 1, 1908. The appellants refused all these tenders, answered the amended complaint upon the merits, and have at all times resisted respondent's prayer for specific performance, as we have stated, upon the ground that the rights of the purchasers and their assignee have been forfeited because of default in payments under the contract. The foregoing facts are either admitted or so conclusively shown by the record as to be beyond controversy, and, in so far as they are drawn from the findings, we do not deem it worth while to notice the exceptions thereto. The court found that there was $14 tendered in excess of the amount necessary to entitle appellants to a deed under the contract. This find-

ing was excepted to, but it appears to be fully sustained by the evidence and we therefore adopt it as true.

It will be noticed that the $200 installment payable October 1, 1908, was not paid when due, nor was any payment thereafter tendered until November 10th, when $831 was tendered. This is the default which it is contended resulted in the purchasers and their assignee, the respondent, forfeiting their rights under the contract. Upon this question the court found, in substance, that appellants promised to go to the office of Mr. King on Monday, November 9th, and accept the $831 to apply on the contract, which was to be there ready for them, and which was $500 more than was then due on the contract; that they failed to go to the office of Mr. King, as agreed, to accept the tender; and on the following day November 10th, at the home of appellants, the tender of $831 was made, when it was refused, and that no notice of declaration of forfeiture was given by defendants. We construe this last to mean that no notice of forfeiture had been given before that tender, though it appears to have been then refused because a forfeiture was then claimed. The evidence is in serious conflict upon the question of when the appellants first attempted to declare a forfeiture by reason of the default in the payment of the October installment. We do not feel called upon to review the evidence here in detail. It is sufficient to say that there is ample evidence to support the court's findings, and we are not disposed to regard the facts differently in view of the learned trial court's opportunity to see and hear the witnesses upon whose testimony the finding is based. This leads to the conclusion that, since the $831 tender was more than the amount due upon the contract at that time, and there being no previous declaration of forfeiture, the rights of the respondent under the contract were not lost. *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822.

It is contended by learned counsel for appellants that, since the complaint does not allege that the taxes and assessments against the property have been paid, and there being no

proof of such fact, therefore the terms of the contract have not been complied with and respondent is not entitled to a deed. There might be some force in this contention if such taxes and assessments charged against the land became a personal obligation against the owner. Our attention has not been called to any authorities indicating that general real property taxes in this state become a personal liability against the owner. Section 83 of the general revenue law, 1897, as amended by chapter 59, p. 74, § 3, Laws 1903 (Rem. & Bal. Code, § 9235), provides that, "Taxes assessed upon real property shall be a lien thereon. . . . ."

There appears to be no statutory method for the enforcement of the collection of taxes upon real property other than by foreclosing the lien thereon in the manner provided by the general revenue laws. This court has heretofore recognized the general rule that when the statute provides an ample and specific method of enforcing collection of taxes, such method is exclusive. *Pierce County v. Merrill*, 19 Wash. 175, 52 Pac. 854; 27 Am. & Eng. Ency. Law (2d ed.), 783; 1 Cooley, Taxation (3d ed.), 17. We think it clear that, under our system of taxation of real property, there is no personal liability against the owner for taxes charged against such property. The word "assessments" in the contract evidently means local assessments, and it was decided in the early case of *Seattle v. Yesler*, 1 Wash. Ter. 572, that such assessments were not a personal charge against the owner of the property, even though the legislature had attempted to make them such. *Asberry v. Roanoke*, 91 Va. 562, 22 S. E. 360, 42 L. R. A. 636; Hamilton, Special Assessments, § 668.

Since we conclude that neither the taxes nor assessments to be paid by the purchasers are a personal charge against the appellants, it is not material to their rights whether such taxes and assessments are paid or not when the respondent has tendered all that is due them and demanded a deed. Such provision in the contract we think has no more force than if it read that the purchaser assumes the burden of such taxes

and assessments rather than using such words as literally construed might mean something more. It is true the contract apparently provides for the giving of a warranty deed, but we do not think it means the appellants are required to give a deed warranting against taxes and assessments accruing after the date of the contract, nor do we construe the decree of the court as imposing upon them any such requirement. Other errors discussed we do not deem of sufficient importance to require our review of them. The decree of the superior court is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

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[No. 8394. Department Two. January 19, 1910.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, *Plaintiff*, v. FLORENCE ANNETTA OLIVER *et al.*, *Defendants*.[1]

INDEMNITY—MORTGAGES—CONSTRUCTION. A mortgage given to a bonding company to secure against loss on an indemnity bond of the mortgagor, a building contractor, or upon any other bonds which he might require, covers loss under a bond issued to another and required by him in pursuance of the arrangement on advice that the mortgagor was interested in the contract.

SAME—AGREEMENT TO SAVE HARMLESS—ATTORNEY'S FEES INCURRED. A mortgage to secure against loss on an indemnity bond, agreeing to protect the mortgagee harmless against all liability by reason of becoming surety on the bond, covers reasonable attorney's fees incurred in resisting liability upon the bond.

MORTGAGES — FORECLOSURE — ATTORNEY'S FEES — REASONABLENESS. The sum of $1,000 is not an unreasonable attorney's fee in the foreclosure of an indemnity mortgage, although the total amount of the judgment was but $7,000, where the suit was strenuously resisted and the record was voluminous.

APPEAL — REVIEW — FINDINGS—CONFLICTING EVIDENCE. Findings will not be disturbed where there was a close question of fact, decided upon oral evidence.

[1]Reported in 106 Pac. 483.

Cross-appeals from a judgment of the superior court for Spokane county, Sullivan, J., entered August 9, 1909, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, but denying a personal judgment, after a trial before the court without a jury. Affirmed.

*Danson & Williams*, for plaintiff.

*Crow & Richardson* and *John C. Kleber*, for defendants.

PARKER, J.—This is a suit to foreclose an indemnity mortgage, executed and delivered by defendant Oliver and wife to the plaintiff, and also to obtain a personal judgment against both Oliver and wife as well as the community. Upon a trial, the court rendered judgment against Oliver and the community, and decreed the foreclosure of the mortgage against all the defendants, but refused to render personal judgment against Mrs. Oliver. Defendants Edgar A. Oliver and Clara M. Tull appealed separately, and the plaintiff appealed because the court declined to render personal judgment against Mrs. Oliver.

The rights of the parties here involved rest upon facts shown by the record, which may be summarized as follows: On May 31, 1902, the defendants Oliver and wife, executed and delivered to the plaintiff an indemnity mortgage upon the real property here involved, the recitals and provisions of which, so far as necessary for us to notice, are as follows:

"Whereas said E. A. Oliver is engaged in the business of contracting and building and whereas in his work of contracting and building he is required to give bonds to secure the performance of contracts which he may undertake and whereas the mortgagee is engaged in the business of becoming surety on bonds and requires surety from the parties for whom it becomes surety and whereas at the special instance and request of the mortgagors and in consideration of this instrument the mortgagee has consented to become surety on the bond of said E. A. Oliver to be written to N. F. Curti in the sum of One Thousand Dollars ($1,000.) and upon the same consideration has consented to become surety

and upon other bonds for said E. A. Oliver to the extent of ($10,000) ten thousand dollars in the aggregate and whereas the parties hereto have agreed that said mortgagors shall give said mortgagee a mortgage upon the real estate herein described to protect the mortgagee harmless from and against any and all liability which it may incur or suffer by reason of executing said bond or any other bonds as surety for said E. A. Oliver, said mortgagee agreeing to execute same only upon the express condition that this mortgage be given as security therefor and whereas it is intended that this mortgage shall be running and continuing security to the extent of bonds to the amount of ten thousand dollars ($10,000), now therefore this instrument witnesseth that in consideration of the premises and of one dollar ($1.00) to them in hand paid, said mortgagors have by this instrument bargained, sold, conveyed, and mortgaged to the mortgagee, that certain lot or parcel of ground lying and being in the County of Spokane, State of Washington, more properly described as follows:

" 'Lots one (1) and two (2) in block one hundred and twelve (112) fourth addition to Railroad Addition to Spokane Falls (now Spokane) Spokane County, Washington.

" 'This mortgage is made upon condition that said mortgagors and both of them shall and will protect said mortgagee harmless from and against any and all liability which it may incur by reason of becoming surety upon the bond of said E. A. Oliver to N. F. Curti and upon any other bonds which he may require hereafter to the extent of ten thousand dollars ($10,000) in the aggregate. Now therefore, if said mortgagors shall truly and faithfully perform said conditions and shall save mortgagee harmless from any and all liability upon bonds which it shall execute as surety for said E. A. Oliver and shall have all bonds so executed duly and regularly released, discharged and exonerated, then this obligation shall be void and the mortgagee shall thereupon immediately release this mortgage, but if said mortgagee shall incur any liability by reason of becoming surety upon said bond to N. F. Curti or upon any other bonds which it may execute as surety for said E. A. Oliver and said mortgagee shall deem it advisable to pay such liability or liabilities and shall pay same, then and in either of such cases, said mortgagee may immediately bring action to foreclose

this mortgage and may do so as often as there are any liabilities and as there remains an equity in said mortgaged real estate and in any and all of such foreclosure actions, said mortgage shall include in addition to the costs and disbursements thereof, a reasonable attorney's fee to be allowed by the court, which shall be included in the judgment rendered in such foreclosure.' "

This mortgage was duly recorded in the office of the auditor of Spokane county on June 17, 1902. Oliver continued in the business of contracting and building until after incurring the obligation sued upon in this action. On or about March 1, 1906, J. A. Colson & Son were engaged in the contracting and building business, and were then about to obtain contracts for the construction of certain buildings, and being unable financially to perform such contracts or to obtain the necessary bonds to secure the faithful performance thereof, for the purpose of taking and performing such contracts, and furnishing the necessary bonds to secure the faithful performance thereof, a contract was entered into between the defendant Oliver and J. A. Colson & Son, as follows:

"Spokane, Washington, March 20th, 1906.

"This Memoranda of Agreement made and entered this day between J. A. Colson and J. W. Colson (J. A. Colson & Son) first parties, and E. A. Oliver, second party witnesseth:

"That whereas the First Parties have secured contracts for the erection of a residence on the corner of Ninth Avenue and Cedar St. in Spokane, from Alfred Coolidge at the Contract price of Twelve Thousand Eight Hundred Sixty-Eight Dollars ($12,868.00) for the erection of a residence on lots Eleven (11) and Twelve (12) Block Twenty-nine (29) Brown's Addition in Spokane from J. Roemer at the contract price of Five thousand two hundred dollars ($5,200.00) and for the erection of a building on lot nineteen (19), Block Eight (8) Havermale Addition to Spokane from Charles J. Kapps at the contract price of Sixteen thousand nine hundred ninety four dollars ($16,994.00).

"And whereas as the said first parties are required to give bonds for the faithful performance of each of said contracts and are unable themselves to give or secure such bonds, and

are without the necessary capital and money to carry on said contracts;

"And whereas the second party can give and secure said bonds, and can advance the necessary means to carry on said contracts;

"Now, Wherefore, on consideration of the premises it is hereby mutually agreed between said parties:

"(1) That the second party at once secure and furnish the necessary bonds for the faithful performance of said three contracts.

"(2) That the second party at once advance the necessary funds to pay for labor and material on said contracts until sufficient estimates are received thereon to carry on said contracts.

"(3) That all estimates and payments on account of each said contract shall be paid and deposited by the Owners or their agents in the Traders National Bank at Spokane to the joint credit and account of E. A. Oliver and J. A. Colson.

"(4) That said moneys so deposited shall be withdrawn only on the joint check signed by both E. A. Oliver and J. A. Colson, and shall be checked out only for the purpose of paying labor and material claims on said contracts and the repayment of advances therefore made by said E. A. Oliver until said contracts are completed and said buildings accepted and all claims for labor and material paid.

"(5) That during the progress of said work J. A. Colson and J. W. Colson shall each be paid the sum of Ten Dollars ($10.00) every week while said work progresses, which money shall be checked out from the estimates deposited in the bank, or if there are not sufficient funds therefor to be advanced by second party.

"(6) That upon the completion of any or all of said contracts the moneys expended on such contract shall be accounted for only by proper checks and receipts therefor and after paying all labor and material claims on such contract and all advances of the second party thereon the remaining profits of said contracts shall be divided and the first parties shall each receive one quarter of said profits and the second party one-half of said profits.

"(7) That in the event there shall be found to be a loss in carrying on and completing of any of said contracts, it is agreed that such loss shall be deducted and paid from the

profits remaining on the completion of any of the other contracts before such profits are divided.

"(8) The ten dollars ($10.00) a week so paid to each J. A. Colson & J. W. Colson shall be deducted from their share or portion of the profits.

"(9) It is agreed that the first parties shall keep proper time books for all labor employed which shall be open to the inspection and check of the second party and that moneys for labor on said contracts shall be paid out by check each week according to their proper time.

"(10) It is agreed that moneys shall be checked out and paid to material men and the contractors only upon the production of proper voucher and receipt for such material or sub-contract.

"(11) It is agreed a strict and separate account be kept of all moneys advanced, and all estimates received on such contract and of all labor and material therefor and that the first parties shall not be entitled to demand or receive anything over said sum of $10.00 a week until the completion of said contracts.

J. W. Colson,
"James A. Colson, First parties,

"Executed in duplicate.

"E. A. Oliver, Second party."

The contracts for the construction of the buildings were entered into in the name of J. A. Colson & Son. The interest of the defendant Oliver in the building contracts was not then disclosed to the parties for whom the buildings were to be constructed, but was made known to the plaintiff. The building contracts required the contractors to give bonds for the faithful performance of the contracts. The defendant Oliver, in pursuance of his contract with J. A. Colson & Son, requested the plaintiff to execute the necessary bonds to secure the faithful performance of the contracts, advising plaintiff of his interest therein. Prior to plaintiff's executing the bonds, it demanded of Oliver that a formal indemnity agreement should be executed by him and his wife, indemnifying it against loss growing out of its liability upon the bonds executed at request of Oliver for the faithful performance of the building contracts. The plaintiff having caused such

indemnity agreement to be prepared, it was delivered to Oliver for execution by himself and wife, and a few days later was returned to plaintiff signed by Oliver and also with the purported signature of his wife thereto. The signing of this agreement by Mrs. Oliver is one of the disputed questions of fact found by the trial court in her favor, which we will notice later in connection with the question of her alleged personal liability. Thereupon the bonds securing the faithful performance of the building contracts were executed by the plaintiff.

There was a failure in the performance of the building contracts, and a failure to pay all claims for labor and material used in the construction of the buildings and a failure to complete them; liens, therefore, were filed and foreclosed against the properties, and the owners were thereby compelled to, and did, pay the amounts thereof found due by the court in the foreclosure suits, in order to protect their properties. Thereafter the owners commenced action against the plaintiff upon the bonds given by it for the faithful performance of the contracts, and such proceedings were had that, in December, 1907, and January, 1908, judgments were regularly entered in the superior court for Spokane county in favor of the owners and against the plaintiff as surety, which judgments plaintiff was compelled to pay, aggregating the sum of $6,403.66.

The defendants Oliver and wife were notified by plaintiff of the pendency of the lien foreclosure suits against the owners, and given full opportunity to appear and defend the same. In protecting its interest in the lien foreclosure suits, and in defending the action of the owners against the plaintiff upon the bonds executed by it to secure the faithful performance of the contracts, it was compelled to, and did, employ attorneys and become obligated to such attorneys for their services in the sum of $500, which the trial court finds to be a reasonable sum for such services.

On January 3, 1907, after the defaulting in the building

contracts and after it was known there would be a large loss on the contracts, Oliver and wife conveyed to Clara M. Tull, by general warranty deed, the real property involved. The court found this deed was given without consideration and for the purpose of defrauding creditors, and particularly the plaintiff. The court found that $1,000 was a reasonable attorney's fee in this foreclosure. The court rendered judgment against Oliver and the community for the amount paid by plaintiff in settlement of the judgment rendered against it in the suit upon the building contract bonds, amounting, with interest, to $7,012; also, for $500 attorney's fees incurred in defending that suit and lien foreclosure suits, and also for $1,000 attorney's fees in this cause; and decreed foreclosure of the indemnity mortgage against all the defendants, and refused to render personal judgment against Mrs. Oliver.

Numerous exceptions were taken by defendants to the findings of the learned trial court from which the foregoing facts are largely drawn; but, with the exception of the disputed fact as to Mrs. Oliver signing the indemnity agreement, and possibly as to the Tull deed being fraudulent, we regard the exceptions as relating to minor matters and having, in view of our conclusions, but little if any influence in determining the ultimate rights of the parties. We have read all of the several hundred pages of testimony and exhibits, and regard the facts fully established as above related.

The first contention of learned counsel for the defendants is, that the indemnity mortgage, which is the foundation of this action, does not include within its terms the liability sued upon, and for which the judgment was rendered and the mortgage was foreclosed. In view of our conclusions upon the rights of the parties, this becomes the principal question in the case. It is argued that the terms of this mortgage do not indemnify the plaintiff against any default, save only such default as may be incurred in a build-

ing contract in which the defendant Oliver becomes the sole contractor, for the faithful performance of which contract plaintiff may have executed a bond. We find practically no aid to the solution of this question in the authorities cited. It is simply a question of the intention of the parties to the mortgage, to be drawn from the language used. It is therein recited:

"This mortgage is made upon condition that said mortgagors and both of them shall and will protect said mortgagee harmless from and against any and all liability which it may incur by reason of becoming surety upon the bond of said E. A. Oliver to N. F. Curti and upon any other bonds which he may require hereafter to the extent of $10,000 in the aggregate."

It seems to us from this language, taken in connection with the general purpose of the giving of the mortgage, which was evidently to promote the interests of the community by enabling Oliver to work to its profit, a profit resulting equally as beneficial to Mrs. Oliver as to himself, the security thereby pledged to plaintiff was not confined exclusively to contracts in which Oliver alone was to become interested, but that the terms of the mortgage are broad and comprehensive enough to indemnify the plaintiff in cases where it executes bonds at the request of Oliver, to secure the faithful performance of contracts in which he has a substantial interest in the profits to be derived therefrom, even though he may not be entitled to the whole of the profits, and where he has joint control. Such was Oliver's interest in and relation to these contracts by virtue of the agreement between him and J. A. Colson & Son. That Oliver had a substantial interest in these contracts was well known to plaintiff at the time of executing the bonds, we think is clearly shown; though it may be admitted that it did not know of all the details of such interest. It was for Oliver and by reason of his credit and its relations with him that the plaintiff executed these bonds, as much so as if the bonds had been given in his name as

principal instead of J. A. Colson & Son. This is evidently the view entertained by the learned trial court, because it found that Mrs. Oliver did not sign the indemnity agreement, hence that agreement did not extend the terms of the mortgage, or lend any aid in the solution of the question of the mortgage security extending over the bonds given upon these contracts. We are of the opinion that the mortgage, unaided by any additional agreement, includes the liability which is the basis of this judgment and decree.

Our conclusion as to the force and effect of the terms of the mortgage disposes of the appeal of Mrs. Tull, since the mortgage was of record long before she obtained her deed to the premises, and of course her rights were subject to the mortgage even if she received her deed free from fraud. This renders it unnecessary to discuss the question of fraud in this conveyance, though we are inclined to the views of the learned trial court upon this question as an additional ground for holding that Mrs. Tull acquired no rights as against those of the mortgagee.

It is contended in behalf of defendants that the $500 attorney's fees incurred by the plaintiff in protecting its interest in the lien foreclosure suits, and in defending the suit upon the bonds by the property owners against it, is not within the terms of the mortgage. By its terms we find that the mortgagors "shall and will protect said mortgagee harmless from and against any and all liability which it may incur by reason of becoming surety upon . . . bonds . . .," etc. We think an expense of this nature incurred in resisting liability upon the bonds is within the terms of the mortgage. It was certainly the duty of the plaintiff to render its liability upon the bonds as small as possible, and to that end employ counsel to resist that liability when it was sought to be established by litigation. This expense was incurred in the interest of the defendants. It is not contended that plaintiff unnecessarily employed counsel, or that the expense incurred was unreasonable in amount.

It is further contended by learned counsel for defendants that the allowance of an attorney's fee of $1,000 in this foreclosure is unreasonable in amount, and should in no event have been more than $700. It may be conceded that in an ordinary foreclosure suit, where the total amount of the judgment is only $7,000, the amount here allowed as attorneys' fees would appear rather excessive; but in view of the strenuous manner in which this foreclosure has been resisted, as evidenced by the voluminous record before us, we are unable to say the discretion of the trial court has been abused in the allowance made.

Upon the plaintiff's appeal there is presented the single question of the personal liability of Mrs. Oliver, and this depends upon the single question of fact as to whether or not she signed the indemnity agreement, which, by its terms, purported to obligate her personally. The evidence is in serious conflict upon this question of fact. A reading of the evidence convinces us it is a close and difficult question to decide. It rests upon a large amount of oral testimony, in addition to a comparison of her genuine signature with the one in question. Under such circumstances, we conclude that the learned trial court, who heard and saw the witnesses testify, correctly found that she did not sign this indemnity agreement, and that being the only basis upon which she could be rendered personally liable, the plaintiff's appeal is not well founded.

The judgment and decree is affirmed. Neither party will recover costs incurred in the appeals to this court.

RUDKIN, C. J., MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8532. Department Two. January 19, 1910.]

## M. YATSUYANAGI *et al.*, *Appellants*, v. S. SHIMAMURA, *Respondent*.[1]

APPEAL—RECORD—NECESSITY OF FINAL JUDGMENT—DISMISSAL. An appeal will be dismissed as presenting no issues, where the appellant states that findings were made, no exceptions thereto appear in the record, and the record fails to show the findings or the final judgment.

Appeal from an order of the superior court for King county, Frater, J., entered December 7, 1909, denying a motion for a new trial. Appeal dismissed.

*F. W. Catlett* and *P. V. Davis*, for appellants.

*Solon T. Williams*, for respondent.

PER CURIAM.—This action was commenced by M. Yatsuyanagi, A. Takatsu, and N. Fukuda, plaintiffs, against S. Shimamura, defendant, to obtain the dissolution of an alleged partnership, and recover $1,000 liquidated damages. After a trial, and on the record hereinafter mentioned, the plaintiffs have appealed.

The appellants base their claim for liquidated damages on an alleged contract of partnership between themselves and respondent, executed on June 30, 1908. In their brief they state that findings of fact were made and entered by the trial judge, but we find no such findings in the record, nor are we able to determine that there were any exceptions thereto if such findings were made. A certified statement of facts has been transmitted to this court as a part of the record. We fail to see its purpose, if, as appellants' counsel contends, the findings were prepared by himself and not excepted to by respondent. The transcript, in the form of minutes entered by the clerk on May 5, 1909, mentions the introduction of evidence and exhibits at the trial, and then recites the following:

[1]Reported in 106 Pac. 503.

"Defendant rests. The court finds for defendant. Plaintiffs' exceptions allowed." On May 29, 1909, a motion for a new trial was filed, which was denied on November 4, 1909. No final judgment has been brought to this court, nor does any appear to have been entered. On this record we are unable to find that any issue is before us for consideration.

The appeal is dismissed.

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[No. 8573. Department One. January 20, 1910.]

AMELIA C. MORSE, *Respondent*, v. THOMAS N. MORRIS *et al.*, *Appellants*.[1]

HOMESTEADS — EXEMPTION — DETACHED TRACTS — STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 528, defining a homestead as the dwelling house in which the claimant resides and the land on which the same is situated, to be selected as in the act provided, and Rem. & Bal. Code, § 552, providing that lands and tenements, not exceeding in value two thousand dollars, actually intended and used exclusively for a home may be selected, a homestead may consist of lots in one block upon which the dwelling is situated, and lots in an adjoining block, separated from the dwelling and by an alley, used as a garden, orchard, and chicken run.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered August 12, 1909, in favor of the plaintiff, in an action for an injunction, after a trial before the court without a jury. Affirmed.

*H. W. Lueders*, for appellants.

*James J. Anderson*, for respondent.

CHADWICK, J.—Plaintiffs brought this action to restrain the sale of property claimed as a homestead.

Amelia C. Morse and Charles H. Morse, husband and wife, were the owners of lots 20, 21, 22, and 23 in block 7, and lots

[1]Reported in 106 Pac. 468.

of the same description in block 8, of Mayhew's addition to the village of Fern Hill, a suburb of Tacoma, Washington. Prior to June 22, 1909, defendant John S. Strickland had obtained judgment against them, and upon that date sued out an execution, which was levied upon the lots in block 7. Plaintiffs' dwelling, woodsheds, and outbuildings were built on the lots in block 8. The lots in block 7 were used as a garden, orchard, chicken run, etc. The two blocks were separated by an alley. The whole property was found to be of the value of $1,600. From a decree in favor of plaintiffs, defendants have appealed. Pending the appeal, Charles H. Morse died, and the appeal is prosecuted by his widow, in her own behalf and as executrix of his last will and testament.

It is contended that the court erred in holding that lots 20 to 23 in block 7 were exempt, for the reason that the property was urban property and divided by an alley. The statutes governing homesteads and their selection, in so far as they apply to our present inquiry, are as follows:

"The homestead consists of the dwelling house, in which the claimant resides, and the land on which the same is situated, selected as in this chapter provided." Rem. & Bal. Code, § 528.

"Homesteads may be selected and claimed in lands and tenements with the improvements thereon, not exceeding in value the sum of two thousand dollars. The premises thus included in the homestead must be actually intended and used for a home for the claimants, and shall not be devoted exclusively to any other purposes." Rem. & Bal. Code, § 552.

Appellants well say that, "whether a tract of land detached from the tract on which the dwelling house is situated may be recorded as a part of the homestead if used by the owner of the home place in connection therewith, is a question about which the courts are not agreed." But the conflict of authority is more apparent than real, for all such decisions are grounded upon the statutes, and material differences exist in the legislative expression of the right of homestead; as, for instance, counsel relies upon certain Minnesota cases, but the

statutes of Minnesota make specific provision for the area to be allowed in cities, villages, and towns. It may be added, in passing, that a more recent decision of the supreme court of the state of Minnesota, *Brixius v. Reimringer*, 101 Minn. 347, 112 N. W. 273, 118 Am. St. 629, has relieved the burden of some of the earlier decisions in that state, and allowed a homestead in rural property where the property was divided by an open roadway.

We must look to the spirit and intent, as well as the words, of the statute. Homesteads are generally allowed either as a certain area, or as of a certain limited value. With the first, we have no concern; for not only does our statute ignore that theory, but expressly provides that the home shall be exempt to the value of $2,000. The underlying principle is the use to which the property is put, and if it is actually put to a use consistent with the ordinary domestic affairs of the household, and taken together does not exceed in value $2,000, there can be no justification in law or reason for denying to it that character which the legislature intended, albeit it may be divided by a street, alley, or a public road. To hold otherwise would read into the law something that is not there, and thus defeat its purpose. Under a statute, in spirit if not quite in form, the same as our own, it was held, in *Gregg v. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637, with great emphasis, as it seems to us, that:

"The statute does not provide that 'a quantity of land, not exceeding in value five thousand dollars, including within its boundaries the dwelling house and its appurtenances, shall be exempt from forced sale.' On the contrary, the language is, that 'the homestead, consisting of a quantity of land, together with the dwelling house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, shall be exempt,' etc. The difference between the two forms of expression is too obvious for explanation. The former makes the exemption of five thousand dollars worth of land the primary object, and the homestead merely a necessary incident. The latter makes the homestead the primary and the sole object of the exemption, with a limitation as to value. . . .

It represents the dwelling house, at which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use and lands used for the purposes thereof. If situated in the country it may include a garden or farm. If situated in a city or town, it may include one or more lots, or one or more blocks. In either case it is unlimited by extent merely. It need not be in a compact body; on the contrary, it may be intersected by highways, streets or alleys. Neither is it circumscribed by fences merely. In respect to quantity by itself considered it is unlimited, whether in town or country. In short, the only tests are use and value. The former is both abstract and statutory—the latter statutory only."

In *Buxton v. Dearborn*, 46 N. H. 43, it was held that a small tract a mile distant from the dwelling house, upon which the claimant cut hay for his cow, might be included in the homestead if the two tracts did not exceed the statutory limit of value. The reasoning of the court was that, if the land was actually used and was necessary to the convenient enjoyment of the home, it would defeat the humane object of the statute to deny the land its proper character because it did not happen to join the lots upon which the dwelling house stood. In *Anderson v. Sessions*, 93 Tex. 279, 51 S. W. 874, 55 S. W. 1133, 77 Am. St. 873, under a constitutional provision that the homestead in a city shall consist of a lot or lots not exceeding $5,000 in value, provided the same are used as a home, it was held that a lot used for raising garden vegetables and fruit for the exclusive use of the family was a part of the homestead, although located in a different part of the city from the owner's residence lot. After stating that a garden is a home use, the court said:

"Then, if a garden is a home use,—one that would protect it if adjoining the residence lot, as held in the *Medlenka* case, —we can see no reason why the same use will not protect it though situated across the street, as in the *Jacob-Hawkins* case, or across ten streets, or anywhere else in the town, city, or village. It might not be as convenient a homestead, thus scattered from suburb to suburb, but probably the best the poor drummer would be able to own. He might not be able

to own the lot adjoining his residence to use for a garden, because of its great value for building purposes, but could buy one in the suburbs of the town, larger and perhaps better adapted for a garden, and thus add a few comforts to his home."

Bearing in mind differing statutes and constitutional provisions, the following cases support our views: *Campbell v. Macmanus*, 32 Tex. 442; *Lacour v. Levy & Co.* (Tex. Civ. App.), 108 S. W. 190; *Jacobs v. Hawkins*, 63 Tex. 1; *Axer v. Bassett*, 63 Tex. 545; *Thebo v. Cain*, Fed. Case, No. 13,875; *Moses v. Groner*, 106 Tenn. 121, 60 S. W. 497; *Gibbs v. Adams*, 76 Ark. 575, 89 S. W. 1008. The cases in which a contrary rule is asserted are absolutely barren of the spirit of the law.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

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[No. 8419. Department Two. January 20, 1910.]

H. A. P. MYERS, *Appellant*, v. H. F. RALSTON, *Respondent*.[1]

DAMAGES—LIQUIDATED DAMAGES—ACCEPTING PARTIAL PERFORMANCE—PENALTY. Liquidated damages of $500, for the vendee's failure to complete a purchase of lots for the agreed price of $2,400, cannot be recovered where the vendor accepted $1,000 for one of the lots and made deed therefor, and also $80 on account of damages sustained; especially where no actual damages were alleged or proved; as liquidated damages cannot be recovered after acceptance of part performance of the contract; and if the agreed sum was intended to cover a partial breach it would be a penalty and not recoverable.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 1, 1909, dismissing an action on contract, upon granting a nonsuit, after a trial before the court without a jury. Affirmed.

[1]Reported in 106 Pac. 474.

*S. A. Keenan*, for appellant.

*Charles E. Congleton*, for respondent.

Crow, J.—This action was commenced by H. A. P. Myers against H. F. Ralston, to recover liquidated damages arising out of the alleged breach of the following contract:

"It is hereby agreed by and between H. A. P. Myers and H. F. Ralston, both of Seattle, King county, Washington, as follows: Said Myers hereby agrees to sell to said Ralston and said Ralston agrees to buy, and does hereby buy of said Myers, the following real property, to wit: Lots four (4), five (5) and six (6) in block thirty-three (33), 2nd plat addition to West Seattle, King county, Washington, at the agreed price of $2,400, to be paid on or before June 1st, A. D. 1907. Said Myers agrees to furnish abstract for said property, and make said Ralston a good deed for same. If said Ralston fails to pay for said property by June 1st, 1907, then he agrees to pay said Myers in the sum of $500.

"Signed in duplicate this 3rd day of April, 1907.

"H. A. P. Myers,
"H. F. Ralston."

At the close of plaintiff's evidence, the trial court granted a nonsuit and dismissed the action. The plaintiff has appealed.

The only question before us is whether the nonsuit was properly granted. The appellant's evidence shows that, prior to the commencement of this action, the respondent paid him $1,000 for lot 4 and the north ten feet of lot 5, being part of the property described in the contract, which appellant thereupon conveyed to a third party at respondent's request; that thereafter appellant repeatedly tendered deeds to respondent for the remaining portion of the lots in the contract described, and demanded full payment of the remainder of the agreed purchase price; but that respondent failed and refused to make any further payment or to accept the deeds so tendered; and that, prior to the commencement of this action, respondent paid appellant $80 on account of damages sustained. Appellant's theory is that, upon re-

spondent's failure and refusal to fully complete the contract of purchase, appellant was entitled to $500 liquidated damages; that $80 only has been paid, and that he should now recover $420. He has not alleged any actual damages sustained by him resulting from the partial nonperformance of the contract by respondent, nor did he on the trial offer evidence of any such damages.

Conceding that the $500 was liquidated damages, and that respondent would have become liable in that sum for nonperformance of his contract to purchase, there was at least a partial performance by him. He paid $1,000 to appellant, who thereupon conveyed a portion of the lots. Where a contract stipulates the amount of liquidated damages to be paid by a party thereto, who fails to fully perform the same, upon his part, such damages are not recoverable for a partial default. Damages for partial nonperformance must be alleged and proven. Mr. Sutherland, in his work on Damages, § 296, in discussing liquidated damages and the effect of a partial performance, says:

"For the same reason that one sum cannot consistently be compensation alike for a total and partial breach, a stated sum made payable for the former cannot by construction be applied to any infraction after acceptance of part performance. In case of such a stipulation the stated sum is only recoverable upon the happening of the very event mentioned in the contract."

In *Shute v. Taylor*, 5 Met. 61, the supreme judicial court of Massachusetts said:

"But without going at large into the subject, one consideration, we think, is decisive, against recovering the sum in question as liquidated damages, namely, that here there has been a part performance and an acceptance of such part performance. If the parties intended the sum named to be liquidated damages for the breach of the contract therein expressed, it was for an entire breach. Whether divisible in its nature, or not, it was in fact divided by an offer and acceptance of part performance. It is like the case of an ob-

ligation to perform two or more independent acts, with a provision for single liquidated damages for nonperformance; if one is performed, and not the other, it is not a case for the recovery of the liquidated damages. See Chitty, Contracts (5th Am. ed.), 863-868; *Hoag v. McGinnis*, 22 Wend. 163." See, also, 13 Cyc. 104; Sedgwick, Damages (8th ed.), § 415; *Lampman v. Cochran*, 19 Barb. 388; *Wibaux v. Grinnell Live-stock Co.*, 9 Mont. 154, 22 Pac. 492; *Raymond v. Edelbrock*, 15 N. D. 231, 107 N. W. 194. The $500 stipulated in the contract was liquidated damages for an entire and not a partial breach. If the parties intended it to apply to a partial breach also, it would then become a penalty instead of liquidated damages, and not enforceable. On the evidence before us, the appellant was not entitled to recover.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

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[No. 8379. Department One. January 21, 1910.]

## MANLEY ETTOR *et al.*, *Appellants*, v. THE CITY OF TACOMA *et al.*, *Respondents*.[1]

STATUTES—REPEAL—EFFECT ON PENDING SUIT—MUNICIPAL CORPORATIONS—CHANGE OF GRADE—DAMAGES. Since the right to recover damages resulting from the original grading of city streets rests upon statute (Laws 1893, p. 207, § 47, and Laws 1907, p. 336, § 48) the repeal of the acts without any saving clause, after suit brought, bars a recovery and works a discontinuance of the suit.

EMINENT DOMAIN—CHANGE OF GRADE—DAMAGE. The original grading of a city street is not a taking or damaging of property, within Const., art. 1, § 16.

STATUTES—VALIDITY—MOTIVE OF LEGISLATURE. The motive of the legislature, or the passing of an act "by stealth," cannot be inquired into by the courts in order to affect the validity of the law.

MUNICIPAL CORPORATIONS—STREETS—RIGHT TO MAKE IMPROVEMENTS—WAIVER OF OBJECTION—DAMAGE FROM CHANGE OF GRADE. The

[1]Reported in 106 Pac. 478; 107 Pac. 1061.

objection that a city can only grade streets under the terms of an ordinance, cannot be raised in an action for damages to abutting property, when the owner might have enjoined the improvement complained of but failed to do so.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 8, 1909, in favor of the defendants, upon granting a nonsuit dismissing an action for damages for the original grading of a street. Affirmed.

*Boyle, Warburton & Brockway*, for appellants.

*T. L. Stiles, Frank R. Baker*, and *F. A. Latcham*, for respondent City of Tacoma.

*H. H. Field* and *Geo. W. Korte*, for respondent Chicago, Milwaukee & St. Paul R. Co.

CHADWICK, J.—This is an action instituted by plaintiffs to recover damages consequent upon grading certain streets in the city of Tacoma. Under § 47, chap. 84, Laws 1893, and § 48, chap. 153, Laws 1907, such damages were recoverable. The legislature of 1909, Laws 1909, p. 151, § 1 (Rem. & Bal. Code, § 7815), repealed this law so that no remedy existed at the time this case was tried in the lower court. Judgment was rendered against plaintiffs in the court below, and they have appealed.

Many questions are raised, but we think the act of the last legislature has reduced this case to a single abstract question of law. In the absence of some statute, a municipal corporation is not liable for damages resulting from the original grading of a street, alley, or avenue, either within the original corporate limits or in any addition thereto. The power to establish grades is incident to its charter, and is implied from the dedication. It was so held in *Fletcher v. Seattle*, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843, where, in the first opinion rendered by the court, the reasons for the rule are set forth and further illuminated by ample quotation from Mr. Dillon's work on Municipal Corporations, vol. 2 (4th ed.), § 995. Thereafter the attention of the court was called

to a statute, Bal. Code, § 821, being the same as § 47 of the Laws of 1893, in so far as it applies to cases of this character, and the opinion in the *Fletcher* case was reversed and recovery was allowed. Reference to the former act will show that it in terms provided that the section allowing a recovery for grading streets should apply only to the original grading of such streets, avenues, or alleys.

To bring the law of this state in accord with the rule in all others, as well as the great weight of authority and reason, as we shall presume, the legislature of 1909 amended the existing law, changing the proviso of the former acts so that it now reads as follows: "That this section shall not apply to the original grading of such street, avenue, or alley." This change was effected while the present action was pending—indeed, while it was on trial; and it is urged on the one hand that the right to recover damages being repealed without saving existing causes of action, no recovery can be had, while on the other hand, it is insisted that the act of 1909 operates as a deprivation of a right to recover damages already accrued, and must be held to be in contravention of the constitution in so far as it affects existing causes of action. If the act of 1909 does deprive appellants of a substantive right, their contention should be sustained, as a similar contention was sustained in *Miller v. Union Mill Co.*, 45 Wash. 199, 88 Pac. 130. The cases cited to sustain the judgment of the court in that case clearly point the distinction that must exist in all cases, and upon which there has been slight difference of opinion on the part of courts and text writers. The right of action in the *Miller* case, and in all similar cases, was sustained, not because the right had accrued while the statute was in existence, but because a right existed independent of the statute. This distinguishes most, if not all, of the cases relied upon by the appellant. In appellant's brief it is said:

"It may be further urged that where a statute gives a corporation or municipality a right to condemn property and

such statute is repealed while condemnation is pending, the proceeding falls to the ground with the repeal of the statute. Such a case in no manner resembles the case at bar. A condemnation proceeding is instituted before the property is taken, a proceeding to determine what the rights of the parties *will* be when the property is subsequently taken by the condemning corporation. No one, of course, has any vested rights in the matter until the property has been taken or damaged. But when this has been done, as plaintiffs' property in this case was damaged, then the case is entirely different and the rights resulting from such taking or damaging cannot be divested by legislative enactment. This appears plainly from the cases of *Stevens v. Marshall*, 3 Pinney 203; *City v. Eaton*, 83 Ill. 535, already referred to, and 8 Cyc. 906, where it is said that 'the right of a land owner to damages for land taken for public use becomes absolute, when the property is actually taken.' That the rights to damages become absolute and vested as soon as the property is taken or damaged is evident also from the fact that the condemnation proceedings cannot thereafter be abandoned. *Shannahan v. City of Waterbury*, 63 Conn. 420, 28 Atl. 611; *Wood v. Trustees*, 164 Pa. St. 159, 30 Atl. 237; *St. Louis R. Co. v. Teeters*, 68 Ill. 144."

The error of this reasoning lies in this, that the original grade of a street, avenue, or alley in the platted portion of a city or town is not a taking or damaging within the meaning of art. 1, § 16 of the constitution. This is made plain in the first opinion in the *Fletcher* case. See, also, *Callender v. Marsh*, 1 Pick. 418; *Pontiac v. Carter*, 32 Mich. 164; *Radcliff's Ex'rs v. Mayor of Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Wilson v. Mayor of New York*, 1 Denio (N. Y.) 595, 43 Am. Dec. 719.

In 2 Dillon, Municipal Corporations, 995b, the author says:

"For the reasons above suggested, it seems to us that, on principle, the mere provision of the constitution imposing a liability for property *damaged* for public use does not create a liability on the part of the municipality for reducing the natural surface of the street, in the course of its normal and ordinary improvement for street purposes proper, to a grade

line for the first time established. If there are cases to the contrary we doubt whether they were well considered and think that they are not well decided. Admitting that under the amended constitutional provision under consideration a municipality may be required to make compensation, not only in cases where there is an actual physical invasion of the adjoining property, but also a physical disturbance of a *right or easement* connected therewith, such as the easement of access, or of light and air, which causes a special damage over and above that which is sustained by the public generally, still such rights and easements of the abutting owner or the right to the support of his soil, is, in the case under consideration, subject, by the very terms and conditions of the dedication or acquisition of the street, to the right of the public to bring it down for street purposes proper to such grade line as the public authorities shall first adopt."

The deeper reason is stated in the case in *Radcliff's Ex'rs v. Mayor of Brooklyn, supra*, as follows:

"The opening of a street in a city is not necessarily an injury to the adjoining land owners. On the contrary, it is in almost every instance a benefit to them. The damage which they sometimes sustain, because the level of the street does not correspond with the level of their land, is usually more than compensated by the increased value which the property acquires from having a new front on a street. In some instances the land owner will suffer a heavy loss; and in this case may, perhaps, be one of the number; but it is *damnum absque injuria*, and the owner must bear it. He often gets the benefit for nothing, when the value of his land is increased by opening or improving a street or highway; and he must bear the burden in the less common case of a depreciation in value in consequence of the work. It may be added, that when men buy and build in cities and villages, they usually take into consideration all those things which are likely to affect the value of their property, and particularly what will probably be done by way of opening and grading streets and avenues."

The right in this case is statutory, and a pending action, at whatever stage, falls with the statute. There is a marked difference between the creation of a new or cumulative remedy

for an existing right and the creation of the right itself. That the repeal of a statute conferring jurisdiction or creating a right of action, without a saving clause, takes away all right to proceed, and that the repealed act will be considered as if it never existed, except for the purposes of those actions or suits which have been prosecuted and concluded while it was an existing law, has been so often stated in the books that it has become axiomatic. It is even held that a repeal after judgment, but before entry of judgment, works a discontinuance of the suit, and that a repeal pending an appeal to the higher court charged the appellate court with the duty of declaring the litigation ended without right of further prosecution.

"This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to pronounce its decision, conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal." *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. 173.

"It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after." *South Carolina v. Gaillard*, 101 U. S. 433.

The cases in support of these rules are collected in Cooley, Constitutional Limitations (7th ed.), 544; 2 Sutherland, Statutory Construction (2d ed.), 285; Endlich, Interpretation of Statutes, par. 479, and 22 Am. & Eng. Ency. Law (2d ed.), 745-752. As will be seen by reference to these authorities, the rule is applied by the courts in all cases where the right depends on the remedy, for the rule is universal that there is no vested right in a particular remedy unless the remedy is a part of the right itself.

It is contended that the case of *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527, 40 Pac. 223, is not in point. But we are unable to distinguish it from the case at bar. It is further contended that the amendatory act of 1909 was passed in stealth and has resulted in a trick upon litigants. We cannot inquire into the motive of the legislature. It is enough that it had the power to repeal the old law, and exercised it.

This conclusion makes it unnecessary to discuss the other questions raised by appellants. The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

ON PETITION FOR REHEARING.

[Decided March 26, 1910.]

PER CURIAM.—We are asked to reverse our former holding in this case, appellants claiming that this case is controlled by certain decisions of the supreme court of the United States not heretofore called to our attention, viz: *Muhlker v. New York & H. R. Co.*, 197 U. S. 544; *Steamship Co. v. Joliffe*, 2 Wall. 450, and *Sauer v. City of New York*, 206 U. S. 536. Under these authorities appellants insist that respondents are liable for the damages claimed even though there had never been a statute giving compensation for damages resulting from an original grade, and that ch. 80 of the Laws of 1909, page 151 (Rem. & Bal. Code, § 7815), is void even if it could be given a retroactive effect. The *Muhlker* case grew out of a condition theretofore unknown to the courts of this country. It had been held by the supreme court of New York that light and air coming from a street could not be taken from the adjacent property owner without compensation by an elevated railroad company. Subsequently one Muhlker acquired certain property fronting on a street over which the track of the railway was constructed. It was laid on or below the grade of the street, but by an act of the legislature the company was authorized to change it to an

elevated road. The company claimed immunity from damages under its original grant of a right of way, and a subsequent act of the legislature. The state court held with the company. This judgment was reversed by the supreme court of the United States. Counsel emphasizes that part of the decision wherein it is said:

"Hence the importance of the Elevated Railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

Reference to the *Muhlker* case, and the New York cases referred to therein, shows that the distinction between an original use and an inconsistent street use or added servitude was considered by the court. The court expressly calls attention to the fundamental error of the state court, saying: " . . . the court concluded that it was the state, not the railroads, which did the injury to plaintiff's property," and ordered a reversal because it found the fact to be otherwise.

But if, as counsel contend, the supreme court of the United States has held that the legislature having once spoken so fixes property rights that it cannot thereafter legislate, or if a court is bound willy nilly by a previous decision upon a subject left open by the constitution, the decision is not sound. For no citizen has the constitutional right to insist that courts shall not reverse their decisions upon matters of property rights, or that legislative assemblies shall not change existing statutes when his right of recovery depends solely upon the decision or statute, and his only reason is that he will thereby suffer a pecuniary loss. If it were so, the state, as well as its municipalities, would be helpless to exercise its primary right of sovereignty over established highways and be subject to what Mr. Justice Holmes, in his dissenting opinion, has been pleased to call "the parasitic

right" of the property owner. As we have shown in our first opinion, an original grade is not a taking or damaging within the meaning of the constitution, whereas an added servitude, as an elevated railroad obstructing light and air, or, as has been held in this state, a regrade is.

In the *Sauer* case, the distinction between the position of appellants and that assumed by the respondents is clearly pointed out. After quoting from the New York cases, the court said:

"It would be difficult for words to show more clearly, than those quoted from the opinions [New York Cases] that such a case, as that now before us, was not within the scope of the decisions or of the reasons upon which they were founded. The difference between a structure erected for the exclusive use of a railroad and one erected for the general use of the public was sharply defined. It was only the former which the court had in view. That the structure was elevated, and for that reason affected access, light and air, was an important element in the decisions, but it was not the only essential element. The structures in these cases were held to violate the landowners' rights, not only because they were elevated and thereby obstructed access, light and air, but also because they were designed for the exclusive and permanent use of private corporations. The limitation of the scope of the decision to such structures, erected for such purposes, appears not only in the decisions themselves, but quite clearly from subsequent decisions of the Court of Appeals."

In none of these cases was the right of a city to make an original grade of its streets involved, nor was the right of the legislature to abridge or abrogate a right given by statute considered or questioned. The point we have to consider here, and the governing rule of law, is made plain in the concurring opinion of Mr. Justice Bradley, in *Louisiana v. Mayor of New Orleans*, 109 U. S. 291. He says:

"I concur in the judgment in this case, on the special ground that remedies against municipal bodies for damages caused by mobs, or other violators of law unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be

repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall, or shall not, indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall, or shall not, do so, is a matter of legislative discretion; just as it is whether the public shall, or shall not, indemnify those who suffer losses at the hands of a public enemy, or from intestine commotions or rebellion. And, as the judgments in the present case were founded upon a law giving this kind of remedy, I agree with the court, that any restraint of taxation which may affect the means of enforcing them is within the constitutional power of the legislature. Until the claim is reduced to possession, it is subject to legislative regulation."

Of this decision Justice Harlan said, in the dissenting opinion in *Freeland v. Williams*, 131 U. S. 421, 423:

"The radical difference between that and the present case is, that the right to sue the city of New Orleans for damages on account of private property destroyed by a mob was given by statute; whereas, the right to claim compensation from a wrongdoer for his illegal conversion of private property to his own use is inherent in the owner, and cannot be taken from him by the state."

In *Steamship Co. v. Joliffe*, a claim arose under the pilotage law of California. After a right of action had accrued, the statute upon which it was founded was repealed. The court said:

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

This is the undoubted rule as between individuals when rights have accrued under contract or quasi contract, but it has never been extended so as to preserve a right of action against the public when that right is not based upon con-

tract, but is asserted because it accrued at a time when the right of sovereignty was temporarily surrendered. A case involving the same principle was before the supreme court of Oregon. *Ladd v. Portland*, 32 Ore. 271, 51 Pac. 654, 67 Am. St. 526. Under an original charter a city was authorized to improve streets at the expense of abutting property owners, but it was provided that, when a street "has been improved under and by virtue of the provisions of this chapter, thereafter such street or part thereof shall not be subject to be again improved, but may be repaired." Thereafter the city was consolidated with others, and a new charter was passed, "all vested rights being reserved." Thereafter the council proceeded to, and did, improve the street and assessed the cost to the abutting property. An action was brought to restrain the collection of the tax, the contract clause of the Federal constitution being invoked. The court held:

"The supreme court of the United States, in interpreting the clause of the constitution now under consideration, has always taken the terms thereof in their ordinary meaning, and holds that the word 'contract,' as used therein, means a voluntary agreement of minds, upon a sufficient consideration, to do or not to do certain things: *Murray v. Charleston*, 96 U. S. 432; *Louisiana v. Mayor, etc., of New Orleans*, 109 U. S. 285 (3 Sup. Ct. 211); *Fisk v. Jefferson Police Jury*, 116 U. S. 131 (6 Sup. Ct. 329). And in our opinion the legislation in question has none of the essential ingredients of such a contract. The power to assess the costs of the improvement of a street upon abutting property is embraced within the sovereign power of taxation primarily in the legislature, but which it may constitutionally delegate to local municipal governments, with or without restraints or limitations; but it is 'never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms'; *Philadelphia Railroad Company v. Maryland*, 51 U. S. (10 How.) 394. And even then, if the exemption is not supported by some consideration, it may be revoked at any time: *Rector, etc., of Christ Church v. County of Philadelphia*, 65 U. S. (24 How.) 300. . . . The manifest purpose of the provision of the charter under consideration was to define the mode and extent of the power of the council in the

matter of street improvements, and the limitation on the exercise of such power was a mere concession to the citizen, and an act of grace, and not a contract by which the state forever relinquishes the sovereign power of taxation. It was a limitation voluntarily imposed by the legislature upon the powers of the city, which that department of the state government could remove at any time public policy or the interests of the municipality might seem to demand, and bound the state only so long as the statute remained unrepealed."

The further point is made that we have not considered the objection that the city can only grade streets under the terms of an ordinance, and that it has not done so in this case. It is possible that appellants could have enjoined the improvement now complained of, but they did not see fit to do so. They allowed the work to be done and now ask damages. The city has defended this action upon the theory that the work was done within the limits of its authority. This is an admission on the part of appellants of the right of the city, and, on the other hand, the city would be estopped to set up the informality of antecedent proceedings, for damages could only be allowed on the theory that the street work is permanent and is to remain as a menace or depreciating influence upon appellants' property.

It is also urged that we assumed the constitutionality of the act of 1909, without discussing the theory of appellants in opposition thereto. Counsel's whole argument in this behalf is based upon the premise that his property is "taken or damaged." Having said in the first opinion that it was not so taken or damaged, we then considered, and now hold, that the act of 1909 in no way offends against the constitution, and is not for that or any of the reasons suggested by appellants to be held void.

It follows that the constitutional rights of appellants were not infringed by the act of the city, neither under the contract clause of the Federal constitution nor the fourteenth amendment thereto.

[No. 8224. Department One. January 21, 1910.]

## Bert R. Williams *et al.*, *Respondents*, v. L. Ella Hewitt, *Appellant*.[1]

Covenants—Incumbrances—Building Restriction. A building restriction in the chain of title, whereby the grantor in a warranty deed was prohibited from erecting certain kinds of buildings after ten years or building within a certain distance of the street, constitutes a breach of a covenant against incumbrances; and a right of action accrues immediately before assertion of any right under the restriction.

Covenants — Against Incumbrances—Damages—Ascertainment —Measure. It cannot be objected that damages for breach of covenant against incumbrances by reason of building restrictions are not susceptible of ascertainment with mathematical accuracy, the measure of damages being the diminished value of the land.

Same—Notice of Incumbrance—Effect. A covenant against incumbrances protects against a building restriction in the chain of title of which the grantee had notice by record, as it covers known as well as unknown defects.

Same—Damages—Evidence of Value—Admissibility. In an action for breach of covenant against incumbrances, evidence of the loss of a sale of the property by reason of the incumbrance is inadmissible to show the diminished value of the property.

Appeal—Review—Harmless Error—Evidence. In an action tried by the court without a jury, the admission of erroneous evidence is harmless, where the lower court doubted its admissibility and there was other competent evidence to establish the fact.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 25, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for damages for breach of warranty of title. Affirmed.

*James Kiefer*, for appellant.

*Smith & Cole*, for respondents.

Gose, J.—In 1906 the appellant conveyed to the respondent a lot in the city of Seattle, by a statutory warranty deed.

[1]Reported in 106 Pac. 496.

There is a restrictive clause in the conveyance to the appellant's immediate grantor, which provides, in substance, that the grantee, her heirs and assigns, for the period of ten years from October 4, 1906, shall not erect any flat, building, or tenement house on the premises, and that there shall not be any residence or other dwelling house erected thereon nearer to the street than are the two residences now on either side of the lot. This clause is not contained in the respondent's deed. The respondent treated the clause as an incumbrance, and commenced the action to recover damages, alleging that it depreciates the value of the property to the extent of $1,000. The case was tried to the court, and a judgment entered in his favor for the sum of $500. The defendant has appealed.

It is first contended that the clause should be treated as surplusage, or as a condition subsequent, and not as an incumbrance. We think the clause is an incumbrance.

"Any right existing in another to use the land, or whereby the use of the owner is restricted, is an incumbrance." *Wetmore v. Bruce*, 118 N. Y. 319, 23 N. E. 303.

"If the right or interest of the third person is such that the owner of the servient estate has not so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of did not exist, his land is, in law, diminished in value and incumbered." *Mackey v. Harmon*, 34 Minn. 168, 24 N. W. 702.

"A building restriction constitutes an incumbrance upon the title, and its imposition is a breach of the covenant against incumbrances." 5 Am. & Eng. Ency. Law (2d ed.), 6.

See, also, *Streeper v. Abeln*, 59 Mo. App. 485.

It is further urged that no damages arise until some right is asserted under the restrictive clause, and that the evidence does not show that any right has been claimed. *Leddy v. Enos*, 6 Wash. 247, 33 Pac. 508, 34 Pac. 665, is cited in support of this contention. In that case it was held that, under the terms of a deed which was not a statutory warranty, the covenant was one for quiet enjoyment, and that

the grantee could not pay taxes and maintain an action on the covenant before a right to enforce payment was asserted. Restrictive clauses of this nature are valid and enforcible in equity. 5 Am. & Eng. Ency. Law (2d ed.), 7, 9. Our code (Rem. & Bal.) § 8747, provides that a statutory warranty deed shall be deemed and held a conveyance in fee simple, with covenants (1) that at the time of the making and delivery of the deed the grantor was lawfully seized of an indefeasible estate in fee simple, (2) that the premises were then free of incumbrances, and (3) that the grantor warrants to the grantee, his heirs and assigns, the peaceable possession of the premises. The contention that the respondents' right of action did not accrue until there was an assertion of right under the clause is not tenable. The very nature of the clause is such that no right could be asserted under it by a third party until the respondent or his successor in title did some act violative of the restriction. Where a right or interest exists in or upon the estate granted, and is in fact a part of it, detracting from the use, value, or possession of the estate, such as an easement, the incumbrance exists when the deed is made, and the amount which it diminishes the value of the estate may be determined at once. *Runnells v. Webber*, 59 Me. 488; *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763. Where the incumbrance consists of taxes or a mortgage, or is of such a nature that it can be computed, and the grantee can compel a release, he cannot recover beyond nominal damages until he has paid the debt.

The point is made that, if the clause is an incumbrance, the damages are not susceptible of ascertainment, and that there can be no recovery. This contention is equally without merit. It is obvious that relief cannot be denied because the action is of such a nature that the extent of the liability cannot be determined with mathematical accuracy. The rule contended for would result in an exemption from liability in all cases of unliquidated damages. The case in this respect is analogous

to a condemnation for a street or for a right of way for a railroad. In the former case the measure of damages is the difference in value in the property before and after the taking, less the benefits to the part remaining. In the latter case the rule is the same, except that no deduction is allowed for benefits. In the case at bar the measure of damages is the difference in the value of the property with and without the restrictive clause, if the value of the property is diminished by the presence of the clause in the chain of title. This view is supported by the following cases: *Streeper v. Abeln*, *Mackey v. Harmon*, and *Runnells v. Webber*, *supra*; *Harrington v. Murphy*, 109 Mass. 299; *Batchelder v. Sturgis*, 3 Cush. 201; 11 Cyc. 1166-7; and, in principle, by *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938.

It is also contended that there can be no recovery because the deed containing the restrictive clause was of record at the time of the execution and delivery of the respondent's deed; that he had constructive notice, and that the warranty does not include a known incumbrance. This rule has been adopted by some courts where the incumbrance was an easement in the property, such as a public highway, a driveway, or a canal, which was open and visible and of a continuous character at the time of the passing of the title. We are not called upon to determine what the rule would be in such cases. In *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, *supra*, it was held that, where the grantor conveys land by metes and bounds with full covenants of warranty, he is bound by his covenant as to the whole tract, although a portion of it was plainly and notoriously tide land claimed by the state. In *Barlow v. Delaney*, 40 Fed. 97, it was contended that the covenants in the deed were not broken by an incumbrance disclosed by the public records, the precise point urged here. In discussing this question, the court, speaking through Judge Brewer, said:

"The very purpose of the covenant is protection against defects; and to hold that one can be protected only against

unknown defects would be to rob the covenant of more than one-half its value, besides destroying the force of its language. If from the force of a covenant it is desired to eliminate known defects, or to limit the covenant in any way, it is easy to say so. General in its language it reaches to all defects within its terms, known or unknown."

See, also, *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039. We deem the logic of this view controlling in this case.

The respondent was permitted to testify that he had a tentative contract for the sale of the property upon which earnest money to the extent of $400 had been paid, and that the title was rejected and the money returned on account of the restrictive clause. This testimony was corroborated by the purchaser. The admission of this testimony is assigned as error, and it is further contended that the judgment is not supported by the evidence. These questions will receive attention in the order stated.

The courts have unanimously condemned this character of testimony, on the ground that it is too uncertain, speculative, and unreliable to form any basis for determining value. As was said in *Sharp v. United States*, 191 U. S. 341, 349, in discussing the admissibility of such evidence:

"In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication and even dangerous in their character as evidence upon this subject."

The same view was announced by this court. *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594; *Chicago, M. & St. P. R. Co. v. Alexander*, 47 Wash. 131, 91 Pac. 626. The testimony should have been rejected. Indeed, the learned trial court expressed a doubt as to its materiality and admissibility. The error, however, was harmless. There is abundant competent evidence tending to show that the property was damaged from eighteen to twenty-five per cent, or to the extent of $1,000 or $1,500. It is true that there is a conflict upon this issue. The practical, common sense view, however, is that a clause in a chain of title which limits the

use or the manner of use of the property would ordinarily diminish its market value.

We are of the opinion that the judgment is supported by the evidence, and it is affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

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[No. 8421. Department One. January 21, 1910.]

INLAND NURSERY AND FLORAL COMPANY, *Appellant*, v. H. C. RICE *et al.*, *Respondents*.[1]

CORPORATIONS—STOCK—CANCELLATION—FRAUD—COMPLAINT—SUFFICIENCY. In an action by a corporation to cancel corporate stock issued to promoters in trust for the corporation, and fraudulently exchanged by them for property taken at an overvaluation, a complaint alleging fraudulent representations, whereby subsequent stockholders were induced to take corporate stock, is demurrable for want of sufficient facts, where it fails to allege that the subsequent stockholders did not have opportunity to investigate the value of the property, or did not receive full value for their stock, and no rights of creditors were involved; since the fraud did not cause any actionable injury.

CORPORATIONS—STOCK—EXCHANGE FOR PROPERTY—OVERVALUATION. A corporation cannot maintain an action to cancel stock issued to its promoters in exchange for property taken at an overvaluation, where no rights of creditors are involved and subsequent stockholders obtained full value in the purchase of their stock; and it is immaterial that the promoters were trustees of the corporation and in a measure dealing with themselves.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered July 15, 1909, dismissing an action to cancel corporate stock, upon sustaining objections to the admission of evidence. Affirmed.

*Peacock & Ludden*, for appellant.

*A. E. Barnes* and *E. O. Connor*, for respondents.

*E. L. Rice*, respondent *pro persona*.

[1]Reported in 106 Pac. 499.

Morris, J.—The purpose of this action was to cancel the stock of appellant, now held by respondents, upon the ground that the same was fraudulently issued. The issues being framed, the court below, at the time of the hearing, sustained respondents' objection to the introduction of evidence, upon the ground that the amended complaint did not state facts sufficient to constitute a cause of action, and this appeal was taken from the judgment of dismissal.

The allegations of the amended complaint reviewed by the ruling of the court are, that H. C. Rice and J. H. Mumm were formerly engaged in the nursery business at Spokane, and on June 11, 1907, they organized the appellant company with a capital stock of $50,000, divided into one hundred shares of the par value of $500; that immediately after filing articles of incorporation, the original incorporators, H. C. Rice, J. H. Mumm, J. M. Harris, and E. L. Rice, who were the trustees named, subscribed for all the capital stock of the company, H. C. Rice subscribing for forty-nine shares, J. H. Mumm subscribing for forty-nine shares, and E. L. Rice and J. M. Harris for one share each, it being further alleged that this was a trust subscription for those who should thereafter purchase such capital stock; that thereupon officers were elected as follows: J. H. Mumm president, E. L. Rice vice president, H. C. Rice treasurer, and J. M. Harris secretary; that H. C. Rice and J. H. Mumm, representing themselves as owners of certain nursery stock, good will, and buildings of the value of $25,000, turned this property over to the company at such valuation, in exchange for capital stock of the company of the par value of $25,000; that the nursery stock, good will, and buildings so transferred are not worth to exceed the sum of $2,000, and that the representations of value by Rice and Mumm were wrongful and fraudulent and in violation of their trust as trustees of the company, and that the exchange of the property for the stock was a fraudulent conspiracy to defraud the appellant; that subsequently Rice and Mumm, fraudulently represent-

ing that they had paid the company the full sum of $25,000, induced others to subscribe for stock and to pay the par value for same, to the amount of $17,000.

The gist of the action, and the act around which the alleged fraud centers, is the exchange of the property of Rice and Mumm for stock of the company at a valuation of $25,000. While the complaint alleges such act to be fraudulent, there is no sufficient allegation of facts in connection therewith to afford the appellant the relief it here seeks. Fraud to be actionable must result in injury, and it nowhere appears that injury has resulted to any one because of such exchange. It does not appear but that subsequent stockholders purchased with full opportunity for investigation into the condition and assets of the company, and that the stock they purchased was fully worth the sum paid therefor. If, therefore, subsequent stockholders obtained full value, there can be no element of injury or fraud as to them. No complaint is made as to creditors.

The mere fact, notwithstanding it is alleged as wrongful and fraudulent, that the promoters of the company exchanged their property for stock of the company at a price agreed upon between themselves and the company, no rights of creditors being involved and subsequent stockholders obtaining full value in the purchase of their stock, gives no right of action in the company to subsequently cancel such promoters' stock upon the mere allegation of less valuation. The company had no property until it received the property of Rice and Mumm in exchange for its stock. Such property was of no greater or less value subsequent to the exchange than before. It would sell for no more as the nursery stock of the company than it would as the nursery stock of Rice and Mumm, and hence could give to their stock no greater real value than the property itself. It is well established that a corporation issuing stock as fully paid by a transfer of property cannot thereafter treat it as partly paid; and upon the same reasoning it is held that, in the absence of actual

fraud, a corporation cannot maintain an action to cancel shares of stock issued in exchange for property, upon the ground that the property was not actually worth the valuation placed upon it. *Iowa Drug Co. v. Souers*, 139 Iowa 72, 117 N. W. 300, 19 L. R. A. (N. S.) 115, and cases cited in note. The appellant here, having placed its own valuation on the property at the time of the transfer for its stock, cannot now complain upon the ground of an overvaluation.

"Whatever may have been in fact the value of the property turned over to the company for its stock, the company agreed to take it for the stock. The persons interested were the stockholders, and there was no dissent on the part of any person concerned from what was then done. Neither any person then holding stock, nor any person who afterwards became a stockholder by assignment from one who then held stock can now make complaint on behalf of the corporation, as against the fairness of that transaction. This I take it to be the settled law on that subject." *Northern Trust Co. v. Columbia Straw-Paper Co.*, 75 Fed. 936.

See, also, *Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 64 N. W. 69; *John R. Proctor Land Co. v. Cooke*, 103 Ky. 96, 44 S. W. 391; *Scovill v. Thayer*, 105 U. S. 143; Clark & Marshall, Corporations, pp. 1363, 1364.

The fact that Rice and Mumm were the owners of the property and trustees of the corporation, and thus in a measure dealing with themselves, does not of itself render the transfer fraudulent and permit the corporation to now cancel their stock. The case of *Old Dominion Copper Min. Co. v. Lewisohn*, 210 U. S. 206, in passing upon a question similar to the one here suggested, says, at page 212:

"At the time of the sale to the plaintiff [the corporation] then, there was no wrong done to any one. Bigelow, Lewisohn and their syndicate were on both sides of the bargain, and they might issue to themselves as much stock in their corporation as they liked in exchange for their conveyance of their land."

In *Turner v. Bailey*, 12 Wash. 634, 42 Pac. 115, this court held that, where fully paid stock is issued for property re-

ceived by a corporation, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account; and in *Kroenert v. Johnston*, 19 Wash. 96, 52 Pac. 605, the rule is announced that, where on the organization of a corporation, real estate is turned over by a stockholder in payment of his stock, at double its real value, and such valuation is accepted without any intention of defrauding existing or subsequent creditors, such stockholder is not liable for the difference between the face value of his shares and the actual value of the real estate.

These cases are decisive of the question before us on this appeal, and the judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

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[No. 8521. Department One. January 21, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Grays Harbor Boom Company et al., Plaintiff*, v. THE SUPERIOR COURT FOR CHEHALIS COUNTY *et al., Respondents.*[1]

LOGS AND LOGGING — EMINENT DOMAIN — PARTIES PLAINTIFF — JOINDER — ALLIED CORPORATIONS. A boom company at the mouth of a river, and a driving company floating down logs by splash dams and artificial freshets, may properly join as parties plaintiff in an action to condemn overflowed lands, where it appears that the overflow is caused by the concurrent acts of the driving company in creating the freshets and of the boom company in choking the mouth of the river with logs and retarding the current, and both companies are jointly interested in gathering and holding logs in the river.

LOGS AND LOGGING — EMINENT DOMAIN — PLATS — EFFECT — STATUTE — CONSTRUCTION. Rem. & Bal. Code, § 7121, providing that a driving company shall file a plat of any of the rivers and lands contiguous thereto as are proposed to be appropriated, does not prevent a company from condemning the right to damage by artificial freshets

[1]Reported in 106 Pac. 481.

lower lands outside of the plat, where the company was not seeking to improve the river or exercise its granted powers at the point where the injury occurs; as the object of the act was that of notice to riparian owners where the improvements were to be made.

SAME. "Contiguous lands" in such act is not to be restricted to lands "next to" or "touching" the river.

Certiorari to review a judgment of the superior court for Chehalis county, Irwin, J., entered December 14, 1909, upon sustaining a demurrer to the petition, dismissing a condemnation proceeding. Reversed.

*J. B. Bridges*, for relators.

*W. H. Abel*, for respondents.

MORRIS, J.—The relators are allied corporations, having the same stockholders and the same management. The driving company is engaged upon the upper stretches of the Humptulips river, in improving it for log driving and creating splash dams and artificial freshets for the purpose of driving the logs down the river. It has filed its plat along all that portion of the river where it has purposed to make any improvement or create any splash dams. The boom company is located near the mouth of the river, and its purpose is to catch the logs driven down the river by the driving company, on the natural flow of the river or by splash dams and artificial freshets, and to sort and store the same in its booms. The respondent C. H. Pealer is the owner of lands adjoining or in close proximity to the river, about a mile or more above its mouth, and so related to the river as to be overflowed and damaged whenever logs are driven to the boom by artificial freshets. These lands are within the plat of the boom company. The respondent brought an action against the driving company and the boom company as joint defendants, to recover damages for the overflow and other injury to his lands, and recovered judgment therefor, which upon appeal was sustained in this court. *Pealer v. Grays Harbor Boom Co.*, 54 Wash. 415, 103 Pac. 451. The relators thereupon

commenced an action to condemn the lands of respondent so as to give them the right to overflow and damage same, to which complaint a demurrer was interposed, which was sustained, and relators, electing to stand upon their complaint, sought and obtained this writ.

The court below recites in its judgment, which it entered upon relators refusal to plead further, that the action could not be maintained, for two reasons: (1) Relators could not join in the action; (2) the driving company had no right of action, because its plat did not cover respondents' lands. These are the only questions raised here, and we will treat them in the same order.

It is manifest, from the admitted facts before us, that these two companies are engaged in a common enterprise; the one gathers the logs upon the upper river and drives them to the booms of the other, the purpose of both being the use of the river in its natural and in the artificial condition created by them, to convey and hold the logs for market. It is also apparent that, whenever artificial freshets are created by the driving company, the water thus released will not confine its overflow and damage to lands within the driving company's plat, but will continue on down the river, overflowing and damaging all lands so related to the river that its banks are insufficient to confine these freshets to the proper channels. The river is tidal for some distance inland from its mouth, and whenever the booms of the boom company are filled with logs and the river above the boom filled with logs on their way to the boom, riding the natural flow of the river, and the driving company upon the upper river with its splash dams and artificial freshets causes large quantities of logs to be driven upon swiftly flowing water down the river, the waters and logs reaching the lower river and meeting the obstruction of full booms and full river above the booms, unable to pass out in the natural flow, there can be but one result, the retarding of the flow of the water and back flows, and the consequent overflow and damage to adjacent lands not protected

by high and sufficient banks. If it were not for the booms of the boom company, the artificial freshets with their burden of logs would pass on down to the mouth of the river and escape. The booms prevent this being done, and force them back upon themselves, and are a decided and material factor in any overflow thus caused, just to what extent it would be difficult to say.

While it is manifest that the overflow and damage are caused by the concurrent acts—the artificial freshets in the upper river for which the driving company is responsible, and the choked and clogged lower river caused by obstructions for which the boom company is responsible—yet to separate these damaging factors and to approximate their respective effects would be a mere matter of speculation. It is easy to know that the joint and combined acts create an injury. It is difficult, and the law would not require one, to go further and apportion this injury between the two responsible causes. Such is within the reasoning, if not within the language, of the court in reviewing the instruction complained of in *Pealer v. Grays Harbor Boom Co.*, *supra*. A like rule is announced in *Heybrook v. Index Lumber Co.*, 49 Wash. 378, 95 Pac. 324, where it was held that a timber company and a mill company, both owned and managed by the same persons and jointly interested in the removal of timber, could be joined in an action for trespass. The relators had an interest in the subject-matter of the action and in the relief demanded, and were properly joined as plaintiffs.

Upon the second question presented, the only purpose of the plat requirement, Rem. & Bal. Code, § 7121 (Laws 1905, p. 232, § 1), is that of notice. Under its charter and within the limits of its plat, the driving company was authorized to enter upon the river for the purpose of removing obstructions, improving the channel, building wing dams, creating artificial freshets, and for other designated purposes. Its power to do so was conditioned upon its filing a plat or survey of that portion of the river it desired to so improve, and the

notice contemplated by the filing of the plat was to owners of lands along the river and within the plat, so that they might have opportunity to take such steps as they deemed proper to protect their rights as riparian owners. The plat is not initiative of the right to improve the river. It is only designatory of the place where that right will be exercised, to the end that others affected thereby may in their turn exercise rights resting in them. It could never have been contemplated that, in the case of an artificial freshet, damage would be caused only to the lands within the plat. An artificial freshet once created must continue until its force is exhausted. Its injurious effect will be left on all lands along the river, when it cannot be confined within its banks below as well as within the plat. And as the right to damage can only be acquired by condemnation, it is, it seems to us, not only proper but necessary for driving companies, seeking to damage lands beyond their plat by the creation of artificial freshets, to acquire that right by condemnation. A proper regard for the rights of the landowner along the river would require such a construction, and not subject the landowner to a multiplicity of actions in suits for injunctive relief and in suits for damages every time such an injury was threatened or completed.

If the driving company were here seeking to improve the river at the point where it contemplates an overflow of respondents' lands, its failure to file a plat including these lands would be fatal, because it can only exercise its powers within the area for which it has itself asked to have those powers conferred upon it. But it is here seeking, not the exercise of any of its granted powers, but—since the thing incidental and accessory to its granted powers must necessarily result in damage to others, and without which damage its granted powers cannot be exercised—that the damage thus resulting be finally fixed and determined. If respondents' position be maintained, it would necessarily mean that any driving company operating upon the upper stretches

of a river, such as the Humptulips, must file a plat or survey embracing within it all lands adjacent to the river and subject to its overflow. Such a construction does not appear to us to be tenable. Neither is the use of the word "contiguous," as used in the statute, Rem. & Bal. Code, § 7121, to be given a restricted meaning of "next to" or "touching." Lands not bordering upon the river nor forming its banks, but subject to damage by its overflow, are as much entitled to protection from damage caused by overflow as is the land next to and forming the bank of the river.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer.

Chadwick, Fullerton, and Gose, JJ., concur.

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[No. 8514. Department One. January 22, 1910.]

Margaret McDougall, *Appellant*, v. Charles A. Murray *et al.*, *Respondents*.[1]

Vendor and Purchaser—Bona Fide Purchasers—Quitclaim—Recording. The grantee in a quitclaim deed, for value and without notice of a prior unrecorded quitclaim deed, is a bona fide purchaser, within Rem. & Bal. Code, § 8781, providing that all deeds shall be recorded and shall then be valid against subsequent bona fide purchasers.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 5, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

*J. W. A. Nichols*, for appellant.

Morris, J.—The only question involved in this appeal is, Is the grantee in a quitclaim deed an innocent purchaser within the meaning of the recording acts?

[1]Reported in 106 Pac. 490.

Both appellant and respondents derive title to the lands in controversy through John McCready, who on November 29, 1892, by quitclaim deed, conveyed the lands to Alex. McCready, which deed was recorded July 8, 1902. On July 19, 1902, Alex. McCready joined with Benjamin McCready in a conveyance by quitclaim deed of various lands, including the land in controversy, to their sister, the appellant, which deed is the foundation of her present claim of title. On August 9, 1894, John McCready conveyed these lands by quitclaim deed to Angus McIntosh, the deed being recorded August 22, 1894. On June 20, 1895, McIntosh conveyed by quitclaim to Charles A. Murray, which deed was recorded June 21, 1895; and on December 24, 1895, Murray, by warranty deed, conveyed to his wife, Jennie R. Murray, which deed was recorded April 4, 1901. On April 27, 1908, Jennie R. Murray, joining with her husband, conveyed to A. J. Weisbach by warranty deed recorded January 7, 1909. Appellant brought the action to establish and quiet her title to the land, and from an adverse judgment she appeals. Respondents do not appear here, and we have no brief in their behalf.

There was formerly much controversy over the question suggested by the appeal, many cases holding that, inasmuch as a quitclaim deed purports to convey only the interest of the grantor, it cannot have any operation when he has already parted with his interest, and that it is not material that his grantee had no actual notice of that fact; that the restricted language of the conveyance is equivalent to notice, and, as a final result, that he who accepts such a conveyance cannot, within the meaning of the recording acts, be a *bona fide* purchaser and as such entitled to protection against prior conveyances made by his grantor. Such, we think, is no longer the rule. The undoubted weight of authority in the more recent cases, following and enforced by the supreme court of the United States in *Moelle v. Sherwood*, 148 U. S. 21, and *United States v. California & Oregon Land Co.*, 148

U. S. 31, has established the rule that the grantee in a quitclaim deed occupies the same position under the recording acts as the grantee in any other form of conveyance. In the *Moelle* case, Mr. Justice Field says:

"The doctrine expressed in many cases that the grantee in a quitclaim deed cannot be treated as a *bona fide* purchaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property, and therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a *bona fide* purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defect in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title or its freedom from the claims of others, or to execute a conveyance in such form as to imply a warranty of any kind even when the title is known to be perfect. He may hold the property only as trustee or in a corporate or official character, and be unwilling for that reason to assume any personal responsibility as to its title or freedom from liens, or he may be unwilling to do so from notions peculiar to himself; and the purchaser may be unable to secure a conveyance of the property desired in any other form than one of quitclaim or of a simple transfer of the grantor's interest. It would be unreasonable to hold that, for his inability to secure any other form of conveyance, he should be denied the position and character of a *bona fide* purchaser, however free in fact his conduct in the purchase may have been from any imputation of the want of good faith."

Brevity forbids a more extended quotation. The entire case is highly instructive and interesting to one seeking aid on the question before us. Mr. Justice Brewer announces the same rule in the two following cases, and it is again an-

nounced by Mr. Justice Gray in *Stanley v. Schwalby*, 162 U. S. 255.

The deed from John McCready to McIntosh, who paid a valuable consideration, was recorded August 22, 1894; while the deed from John McCready to Alex. McCready, under which appellant claims, was not recorded until July 8, 1902. The statute, Rem. & Bal. Code, § 8781, requires that all deeds shall be recorded in the office of the county auditor of the county in which the land is situate, and shall be valid against *bona fide* purchasers from the date of their filing in said office for record, and when so filed shall be notice to all the world. It appears from the record that neither the respondents nor McIntosh had knowledge that John McCready had executed the deed to Alexander McCready on November 29, 1892, until such knowledge came from its filing for record July 8, 1902, although they made inquiries as to the ownership of the property and a search of the records prior to the purchase by McIntosh. Under such circumstances McIntosh was an innocent purchaser in good faith, and he and his grantees are entitled to all the protection awarded by the recording act to such purchasers.

The territorial court, in *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583, laid down the rule that:

"Under the statutes of our territory, a quitclaim deed is just as effectual to convey the title to real estate as any other form of deed, and a grantee in a quitclaim deed is entitled to the same presumptions as to *bona fides*, and has the same rights, as a grantee in a deed of general warranty."

This case was followed by this court in *West Seattle Land & Imp. Co. v. Novelty Mill Co.*, 31 Wash. 435, 72 Pac. 69.

We are, therefore, of the opinion that the court below followed the better and greater weight of authority in announcing its ruling, a ruling not only supported by the weight of authority, but based upon the soundest reasoning. Reference may be had to the case of *Babcock v. Wells*, 25 R. I. 23, 54 Atl. 596, 105 Am. St. 848, where in a monographic

note many cases upon the point before us are collated and discussed; also to the Central Law Journal, vol. 70, p. 10, under date of January 7, 1910, where the same subject is treated in a note following the case of *Downs v. Rich* (*Rich v. Downs*, 81 Kan. 43, 105 Pac. 9).

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

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[No. 8535. Department One. January 22, 1910.]

DAVID EDWARDS, *Appellant*, v. W. W. BECK *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—FAILURE TO CONVEY—RIGHTS OF VENDEE—LIMITATION OF ACTIONS—TRUSTS—NOTICE OF ACCRUAL. Vendors who had given a bond for a deed and had received the full purchase price, are not trustees of the legal title for the vendee so as to arrest the running of the statute of limitations, where the vendee never took possession of the property; and any action by heirs of the vendee for relief, upon the grantors' conveyance to third persons, is subject to the statute of limitations, which begins to run when the right accrues, although the heirs allege that they were without notice of their rights.

Appeal from a judgment of the superior court for King county, Main, J., entered June 23, 1907, upon sustaining a demurrer to the complaint, dismissing an action for an accounting. Affirmed.

*Harry E. Warner* and *France & Biddle*, for appellant, contended, that in equity, the vendor becomes the trustee of the legal title for the purchaser. 25 Cyc. 1167; Wood, Limitation of Actions, page 438, § 219. The trust relation being established, the statute of limitations did not begin to run until notice of breach of the trust. *Irwin v. Holbrook*, 26 Wash. 89, 66 Pac. 116; *Fidelity Nat. Bank v. Adams*, 38

[1]Reported in 106 Pac. 492.

Wash. 75, 80 Pac. 284; *Sterns v. Hochbrunn*, 24 Wash. 206, 64 Pac. 165; *Chicago & E. I. R. Co. v. Hay*, 119 Ill. 493, 10 N. E. 29; *Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 624; *Holman v. Criswell*, 15 Tex. 394; *Hemming v. Zimmerschitte*, 4 Tex. 159; *Vardeman v. Lawson*, 17 Tex. 10; *Newsom v. Davis*, 20 Tex. 419; *Harris v. King*, 16 Ark. 122; *Whittington v. Flint*, 43 Ark. 504, 51 Am. Rep. 572; *Coleman v. Hill*, 44 Ark. 452. On petition for rehearing, they contended that *Luco v. Toro* (Cal.), 18 Pac. 866, was overruled in *Luco v. De Toro*, 91 Cal. 405, 27 Pac. 1082. The possession of the trustee is the possession of the *cestui que trust* and is not adverse thereto. Buswell, Limitations and Adverse Possession, p. 475, § 341; *Id.*, p. 456, § 327; 1 Cyc. 1049, § 15; 28 Am. & Eng. Ency. Law, pp. 1133, 1134, §§ 2, 3; 2 Am. & Eng. Ency. Law, p. 477, § 5a; 1 Am. Digest (Century ed.), p. 2282, § 333, and cases cited; Hill, Trustees, § 264, note 3; Tiffany and Bullard, Trusts and Trustees, 715, 717; Angell, Limitations, §§ 137, 138; Pomeroy, Equity Jurisdiction, §§ 105, 147, 155, 368, 1010, and 1046; *Harris v. King; Hemming v. Zimmerschitte; Holman v. Criswell*, and *Love v. Watkins, supra*. The defense of adverse possession cannot be set up to establish title, where the relation of vendor and vendee exists between the parties. *County of Alleghany v. Parrish*, 93 Va. 615, 25 S. E. 882; *Hads v. Tiernan*, 213 Pa. 44, 62 Atl. 172; *Speidel v. Henrici*, 120 U. S. 377.

*Peters & Powell*, for respondents.

MORRIS, J.—On the 5th day of February, 1890, the respondents executed and delivered to John Brown their bond for a deed to certain lands in Seattle, conditioned upon the payment of a sum of money on or before October 1, 1890. The amended complaint alleges the payment of this sum prior to the time fixed, and the death of John Brown on September 17, 1894, leaving him surviving Earl Brown, a son, and

Loretta A. Brown, a daughter. On September 18, 1894, the respondents executed their deed, whereby they conveyed the lands to John Brown, which deed was not recorded. On June 27, 1903, respondents conveyed the lands in question to H. McCord and O. E. Kenyon, who placed their deed on record. It is further alleged that Earl Brown and Loretta Brown had no knowledge of the above facts until some time within the year 1908, and that in October of that year they conveyed the lands for a valuable consideration to the appellant, and also assigned to him all their right, title, and interest arising under the bond. The prayer of the complaint is for an accounting, and for judgment for all sums found due. To this amended complaint respondents demurred, upon the grounds that it did not state facts sufficient to constitute a cause of action, and that the action was not commenced within the time limited by law. This demurrer being sustained, appellant refused to plead further and, judgment being entered against him, he appeals.

It is contended by appellant that respondents were trustees of the legal title for John Brown, and that the statute of limitations does not run against such a relation until notice of the breach, which was in October, 1908. Such a rule has been announced in a number of cases, but from our examination of the authorities we think the better rule, and the one established by the better reasoning, is to apply the doctrine only where the vendee is in possession of the land; the distinction between the two cases, and the reason for the latter rule, being that, where the vendee is in possession, the contract is executed upon both sides; the vendor has received all that is due him under his bond, and the vendee has obtained the possession of the land purchased. There is nothing remaining except the formal execution and delivery of the evidence of the title. With this exception there has been a specific performance of the contract, and the vendor, having recognized the vendee's right to possession, cannot defeat his further right to that which is the muniment of his title.

The vendor, having recognized and acquiesced in the vendee's possession, must likewise recognize and acquiesce in that which supports and defends his continued possession. When, however, the vendee is out of possession, as in the case before us, the reason upon which the former rule is based no longer exists, and following a well recognized doctrine, the reason for the rule failing, the rule itself fails.

The vendee is, however, not without his remedy. He has his action to enforce the specific performance of his bond, or if that be futile or not desired, he has his action for damages for its breach. There is good ground for holding he would have a third remedy in a case where, as appears here, the vendor has made a sale of the land to a third party. He could recognize the sale and bring an action as for money received for his benefit. These rights of action are, however, subject to the running of the statute of limitations and, as in all other cases where the statute will defeat the right of recovery, the statute begins to run from the time when the right of action accrues. In his argument to the court appellant placed his main reliance upon *Chicago etc. R. Co. v. Hay*, 119 Ill. 493, 10 N. E. 29, and *Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 624. In each of these cases the vendee was in possession, and such fact is dwelt upon by the court in announcing the reason for its rule. In the subsequent California case of *Luco v. Toro* (Cal.), 18 Pac. 866, the court refused to extend the rule to a case where the vendee was not in possession, and refers to the fact that the vendee was in possession as the reason for the rule in *Love v. Watkins*, and therefore calling for the application of a different principle. Other cases are cited from Texas and Arkansas, in some of which the vendee was in possession; in others, not.

That the statute will run against an action for specific performance was held in *Wilt v. Buchtel*, 2 Wash. Ter. 417, 7 Pac. 891. Appellant is not here seeking specific performance. Neither is he seeking damages as upon a breach of the covenant of the bond. He is rather ratifying and acquiescing

in the sale to McCord and Kenyon; and, treating the money received from such sale as a trust fund held for his benefit, he seeks its recovery. He prays for an accounting, but manifestly there could be nothing to account for except the sum derived from the sale of the land. So that, whether the action be construed as one seeking the value of the land rather than the land itself, or one in which it is sought to compel the respondents to pay over money retained by them upon a sale of the appellant's lands, the statute would in either case have run its full course, and the action could not be maintained.

The ruling upon the demurrer was proper, and the judgment is sustained.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

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[No. 8144. Department One. January 22, 1910.]

## THE STATE OF WASHINGTON, *on the Relation of Ovid Billings et al., Respondents*, v. C. H. LAMPREY, *as Mayor of the City of Snohomish, et al., Appellants.*[1]

MANDAMUS—PEREMPTORY WRIT—FORMAL JUDGMENT—NECESSITY. A peremptory writ of mandamus, on sustaining a demurrer to the application, upon findings and conclusions, issued prior to the entry of formal judgment, is premature; since the proceeding has all the elements of a civil action, and the statute provides for judgment on the issues distinct from the writ issued to enforce it.

APPEAL—APPEALABLE ORDERS—FINALITY—SUBSTANTIAL RIGHTS. An order refusing to quash a peremptory writ of mandamus, prematurely entered upon findings, etc., without a formal judgment, is appealable as an order affecting a substantial right which in effect determines the action.

MUNICIPAL CORPORATIONS—JUDGMENTS—FUNDS FOR PERSONAL INJURY CLAIMS. A judgment against a city for personal injuries was not, under former laws, satisfied by issuing and tendering warrants upon the city's indebtedness fund, since the city current expense fund was the only fund on which the warrant could be drawn.

[1]Reported in 106 Pac. 501.

SAME. Rem. & Bal. Code, §§ 7999-8001, authorizing cities to create an accident fund, and directing payment of personal injury judgments therefrom, affects only the remedy, and is applicable to existing judgments for which no warrants were drawn when the law went into effect.

Appeal from an order of the superior court for Snohomish county, Still, J., entered March 2, 1909, denying a motion to quash a writ of mandamus, issued upon sustaining a demurrer to the application for the writ. Reversed.

*John W. Miller* and *Robert McMurchie*, for appellants.

*J. Y. Kennedy* and *Hathaway & Alston*, for respondents.

FULLERTON, J.—On January 19, 1909, the respondents recovered a judgment against the city of Snohomish in the sum of two thousand dollars, for personal injuries suffered by Lydia Billings from a fall upon the sidewalk of that city. Thereafter, on the same day, pursuant to the provisions of the statute relating to the collection of judgments against municipalities, the respondents satisfied the judgment of record, procured a certified transcript thereof showing such satisfaction, and presented the same to the appellants as mayor and city clerk of the city of Snohomish, and requested them to issue to the respondents a warrant of the city of Snohomish, drawn upon the current expense fund of the city, for the amount of the judgment with costs. These officers of the city refused to issue a warrant on the city fund requested, but issued and tendered a warrant on the indebtedness fund. This warrant respondents refused to accept, and brought the present proceedings in mandamus to compel the issuance to them of a warrant on the city's current expense fund.

After the service of the writ, the officers of the city appeared and demurred to the application on all of the statutory grounds. The demurrer was overruled, whereupon the appellants elected to stand thereon, and refused to plead further. The court thereupon made written findings of fact, on which it drew the conclusion of law that the respondents

were entitled to the issuance of a peremptory writ of mandamus compelling appellants to issue a warrant on the city's current expense fund for the amount of the respondents' judgment. No formal judgment was entered showing the determination of the court upon the merits, nor was there any formal order directing the peremptory writ to issue. The court, however, did issue a peremptory writ in accordance with its findings. After the service of this writ, the appellants moved to quash it, on the ground that no final judgment or order had ever been made or entered authorizing or directing its issuance, or adjudging the respondents entitled to the writ. On a hearing, the court entered an order overruling and denying the motion. The city appeals.

Two principal contentions are made by the appellant, namely: (1) that the peremptory writ was prematurely issued; and (2) that the respondents are not entitled to a warrant on the city's current expense fund.

The first contention we think is well taken. In this state a proceeding in mandamus,

" . . . is a judicial investigation, the object of which is the determination of civil rights, the same as any ordinary proceeding; not only the determination of rights, but their determination in such a way as to culminate in an effective judgment." *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50.

"In our practice, mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The procedure has in it all the elements of a civil action. The facts stated in the affidavit for the writ may be controverted by a return, raising both questions of law and fact. The return likewise may be controverted, and a trial had on the issues of fact thus raised, either before the court, a jury, or a referee, as the court may order. Judgment can be entered on the verdict or findings not only directing the issuance of a peremptory mandate, but for damages and costs on which execution may issue. The statute has been so framed as to afford complete relief in all cases falling within its scope and purport, whether these be cases of wilful violation of recognized rights, or denials, made

in good faith, that the rights contended for exist." *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207.

Moreover, the proceeding is a proceeding in court, as contradistinguished from a proceeding before the judge at chambers, and it is so framed that an issue of fact therein may be tried by a jury, and a money judgment for damages awarded as a part of the relief. The statute also provides that if "judgment be given for the applicant he may recover the damages which he has sustained, . . . and a peremptory mandate must also be awarded without delay;" thus clearly making a distinction between the judgment and the peremptory writ. The rule is laid down in 26 Cyc. 483, in the following language:

"The judgment in mandamus proceedings is distinct from the final or peremptory writ which is issued in pursuance of the judgment for the relator. The writ recites the facts showing why it should issue, the judgment directing it, the command of the acts to be performed, and a provision for return. The judgment shows the determination of the court on the merits, directs or denies the writ, and awards the damages and costs, if any.

"At common law the peremptory writ was regarded as the final determination of the rights of the parties, and no formal judgment seems to have been required upon which to base the writ. This practice is held applicable in some states to peremptory writs issued by a judge as such; but, when the proceedings are before the court, statutes generally have made a material change in the common law practice, and before the peremptory writ can properly issue, a formal judgment must be entered as a basis therefor."

See, also, *State ex rel. McGregor v. Young*, 6 S. D. 406, 61 N. W. 165.

It must follow, we think, that before a peremptory writ of mandamus can properly issue, a formal judgment authorizing it must be entered determining the nature and extent of the relief granted.

In this connection the respondents argue that if a formal judgment is required in this proceeding and none has been

entered, this appeal will not lie for want of a final judgment from which to appeal. But the appellants moved to quash the peremptory writ and their motion was overruled by a formal order entered in the cause. An appeal lies from this order under the sixth subdivision of the statute relating to appeals, Rem. & Bal. Code, § 1716, which allows an appeal from any order affecting a substantial right in a civil action or proceeding which in effect determines the action or proceeding. The order quashing the writ determined the proceeding in so far as the appellants were concerned, and if appeal is denied them, their only remedy to procure a review of the order is by an independent action to enjoin the enforcement of the writ. It is not the policy of the law to drive a litigant through such a circuitous route, when the same result may be accomplished by a direct proceeding.

Passing to the second contention presented, we are clear that the respondents were not obligated to take a warrant for the judgment on the indebtedness fund of the city. As between its indebtedness fund and its current expense fund, the latter is the only fund on which the warrant could be lawfully drawn. This we held in effect in the case of *Townsend Gas & Elec. Light Co. v. Hill*, 24 Wash. 469, 64 Pac. 778. But this question is material now only because it is necessary to show that the appellants did not satisfy respondents' judgment by issuing and tendering to them a warrant on the city's indebtedness fund. Since this appeal was taken the legislature has provided a new and distinct method of collecting judgments for personal injuries against cities of the second, third and fourth classes. Laws 1909, page 423 (Rem. & Bal. Code, §§ 7999-8004). It has authorized such cities to create an accident fund, and directs that when a judgment for personal injuries has been obtained against any such city, and such judgment has been duly certified to the city clerk as provided by existing laws, the clerk shall draw warrants on this fund in the full amount of the judgment. This method of paying judgments is made

exclusive by the statute, and since it affects the remedy only, it is applicable to existing judgments for which no warrants were drawn at the time it became operative as a law. It follows, therefore, that the respondents' judgment must be paid by warrants drawn upon the accident fund of the city of Snohomish, rather than upon its current expense fund.

The order appealed from will be reversed, and the cause remanded with instructions to quash the peremptory writ of mandate, and to proceed further with the mandamus proceeding in accordance with this opinion, allowing the respondents to amend their application for the writ of mandate if they so desire.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

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[No. 8185. Department Two. January 22, 1910.]

NANNIE N. JOHNSON, *Appellant*, v. AMEL JOHNSON, *Respondent*.[1]

MARRIAGE—VALIDITY — FIRST COUSINS — STATUTES — EXTRATERRITORIAL FORCE. A marriage between first cousins domiciled in Seattle, contracted in Victoria, B. C., where they went to evade the law of this state prohibiting such marriages, the parties immediately returning to their domicile, is void, and it is error to refuse a decree of divorce therefrom.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 18, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for a divorce. Reversed.

*P. P. Carroll*, for appellant.

RUDKIN, C. J.—This is an appeal from a judgment denying a divorce to the appellant and dismissing her action.

[1]Reported in 106 Pac. 500.

The case is brought here on the findings of fact, conclusions of law and decree. The only findings we deem it necessary to set forth or consider are the following:

"That plaintiff and defendant were married at Victoria, B. C., May 2d, A. D. 1905, and ever since have been and now are husband and wife.

"That at the time of said marriage the parties hereto were domiciled in the city of Seattle, county of King, state of Washington, and that to avoid the law of this state prohibiting said marriage they went to Victoria, B. C., and were married there, immediately returning to the said city of Seattle where they have ever since made their domicile.

"That plaintiff and defendant are first cousins of the whole blood, the mother of plaintiff and the mother of defendant being sisters of the whole blood."

There was no appearance by the defendant in the court below, and no brief has been filed in this court by him or in his behalf, but from such investigation as we have been able to give the subject, we are at a loss to know upon what ground or for what reason the divorce was denied. Rem. & Bal. Code, § 7151, declares that,

"Marriages in the following cases are prohibited: . . .

"(2) When the parties thereto are nearer of kin to each other than second cousins, whether of the whole or half-blood, computing by the rules of the civil law;

"(3) . . . and if any person being within the degrees of consanguinity or affinity in which marriages are prohibited by this section carnally know each other, they shall be deemed guilty of incest, and shall be punished by imprisonment in the state penitentiary for a term not exceeding ten years and not less than one year."

"A marriage between relations within the prohibited degrees is void, its continuance is repugnant to good morals and public policy, and it will be annulled at the instance of either party, notwithstanding the applicant entered into it knowingly and wilfully." 26 Cyc. 907.

In considering the validity of a marriage contracted in violation of a similar statutory prohibition, in *In re Wilbur's*

*Estate*, 8 Wash. 35, 35 Pac. 407, 40 Am. St. 886, this court said:

"The general rule is that the *lex loci contractus* is controlling in adjudications involving the validity of marriages . . . . though this doctrine has an important exception, which is involved in the case before us. Appellant claims that inasmuch as, at the time of the alleged marriage, there was in this territory a statute prohibiting a marriage between a white person and an Indian (Acts 1866, p. 81), even considering the reservation as a foreign jurisdiction, the marriage was void, because Wilbur thereby committed a fraud upon the law of his domicile, which was the territory. Where a marriage is prohibited, either by the statute or by those rules of morality and decency which make it against the natural law of civilized nations for two persons to marry, as incestuous or polygamous marriages, it is in vain for them to go beyond their domicile, to engage in a contract of marriage, for the purpose of avoiding the prohibition. Their contract will be held void upon their return."

See, also, *State v. Fenn*, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800.

Marriages between parties so nearly related are prohibited in nearly all civilized countries, and if argument in support of such a policy is needed, the fact that the only offspring of this marriage is deaf and dumb supplies it. The marriage being void, it was the duty of the trial court to declare it so, and the judgment is reversed, with directions to annul the marriage, and for further proceedings not inconsistent with this opinion.

DUNBAR, CROW, MOUNT, and PARKER, JJ., concur.

[No. 8569. Department Two. January 22, 1910.]

## L. H. LITTLE *et al.*, *Appellants*, v. ROBERT GIBB *et al.*, *Respondents*.[1]

DEEDS—ACKNOWLEDGMENT—NECESSITY—NOTICE. A written grant of an interest in land—an easement for water pipes—is valid without acknowledgment, as between the parties and subsequent purchasers with notice.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 15, 1908, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Reversed.

*Edgar C. Snyder*, for appellants.

*George U. Wenner*, for respondents.

RUDKIN, C. J.—On the 21st day of July, 1906, Charles Bemis was the owner of tracts 5 and 6 of Sturtevant's Plat of Rainier Beach Acre Tracts, in King county, and on that day, by an instrument in writing, granted to the plaintiffs, who were the owners of a portion of tract 4 of the same plat, the right to construct and maintain a service water pipe across tracts 5 and 6 for the purpose of conducting water to certain cottages owned by the plaintiffs on tract 4. The present action was instituted by the plaintiffs against the defendants, as successors in interest to Bemis in tracts 5 and 6, to restrain them from breaking up or injuring the water pipes or interfering with the flow of water therein. The complaint alleged the execution and delivery of the instrument granting the right or easement to the plaintiffs; that the defendants purchased from Bemis with notice of the rights of the plaintiffs; that the defendants were threatening to break up and sever the water pipes, etc. A demurrer interposed to this complaint was sustained, and the plaintiffs electing to

[1]Reported in 106 Pac. 491.

stand on their complaint and refusing to plead further, a judgment of dismissal was entered, from which this appeal is prosecuted.

The briefs state that the demurrer was sustained upon the ground that the written grant of the right of way or easement was revocable at will, because not acknowledged by the grantor, as required by the laws of this state, and this is the sole ground upon which it is here sought to sustain the judgment of the court below. The case of *Hathaway v. Yakima Water, Light & Power Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 874, upon which the respondents chiefly rely, has no application to the facts in this case, for the reason that we are not here concerned with a parol grant of an easement or interest in land. The grant in this case was evidenced by writing, and this court has held, in common with most courts, that an unacknowledged deed is good as between the parties thereto, and against subsequent purchasers with notice thereof. *Matson v. Johnson*, 48 Wash. 256, 93 Pac. 324, 125 Am. St. 924, and cases cited. The written instrument attached to the complaint as an exhibit in this action was, therefore, a valid grant as between the parties, and is equally valid against the respondents, if they purchased with notice of the prior grant to the appellants, as alleged in the complaint.

For the foregoing reasons the judgment is reversed, with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

DUNBAR, CROW, MOUNT, and PARKER, JJ., concur.

[No. 8350. Department Two. January 25, 1910.]

CHARLES L. WILLIAMS, *Respondent*, v. LEWIS N. ROSENBAUM, INCORPORATED, *Appellant*.[1]

DAMAGES—CONTRACTS—LIQUIDATED DAMAGES—DELAY IN BUILDING. A provision in a building contract for liquidated damages of $10 per day for delay in completing the building is valid, and entitles the owner to damages for such part of the delay as was not due to his fault, and is not avoided by radical alterations, where the contract made provision therefor.

CONTRACTS—ACTIONS—DEFENSES—ISSUES. In an action on a building contract for a balance due, the plaintiff cannot avoid the provision for liquidated damages for delay by asserting *quantum meruit* under the claim that the contract was avoided by alterations, or by the fact that the owner did not stop the work, he having pursued the remedy provided in the contract for liquidated damages.

Appeal from a judgment of the superior court for King county, Yakey, J., entered June 21, 1909, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Reversed.

*Ira Bronson* and *D. B. Trefethen*, for appellant.

*E. H. Kohlhase*, for respondent.

DUNBAR, J.—The plaintiff and respondent entered into a contract with the defendant and appellant to build a house for the latter. The agreement was executed on the 10th day of June, 1908; and among other provisions, was the following:

"The party of the second part further agrees to start work as soon as possible from this date and to prosecute and complete all of the work herein mentioned in a rapid and diligent manner, time being of the essence of this contract, completely finishing said building on or before the 1st day of August, 1908, it being agreed that should said second party fail to so complete said building at the date mentioned then he is to forfeit the sum of $10 for every day thereafter that

[1]Reported in 106 Pac. 493.

said building remains unfinished as liquidated damages, which amount is to be deducted from the consideration herein named."

It was also provided in the contract that the party of the first part should have the right as work progressed to make changes and alterations in the construction of the building, under certain conditions. The contract price was $2,100. Upon the completion of the building, suit was brought for $600 balance due on contract price, for compensation for extra work in the sum of $177.80, $5 for the preparation of a lien, $200 attorney's fees, and for some other minor costs. The answer put in issue some of the allegations of the complaint which it is not necessary to notice here under the assignments of error presented; denied the reasonableness of the attorney's fees; alleged that the building was not completed within the time required, and demanded a deduction from the amount of the contract price of $10 a day from the date on which the building was to be finished under the contract up to the date at which it was really completed. The court rendered judgment for $740, which judgment included $140 for extra work, and also rendered judgment for $100 as attorney's fees, and gave judgment for the establishment of the lien.

The record shows that a mistake was made in pointing out the ground on which the building was to be erected, and that the ground which was actually built upon required a stronger foundation than would have been required on the ground which was pointed out to the contractor by the architect, who was the appellant's agent in that respect, and on the first day of July the respondent was stopped in his work by the city authorities until certain extra foundation work was done which was specified by the city. This work the respondent did, and he was delayed by reason of this extra work until the 15th day of July, when he proceeded to work, and the house was completed, according to respondent's contention, on the 12th day of September, 1908.

On this appeal it is conceded by the appellant that the respondent was entitled to $140 which was awarded him in the judgment for extra expense and delay, but he claims that there should be a reduction of the judgment to the extent of the amount of $10 per day for the length of time which existed between the date upon which the building was to be completed under the contract and the date when it actually was completed, less the fifteen days during which respondent was delayed in the work by reason of the fault of the appellant. It is conceded that the commencement of the delay was on the 1st day of July, and that it ended on the 15th day of July. Under the contract the building was to have been completed on the 1st day of August, 1908. It was not completed until the 12th day of September, 1908, which would amount to forty-three days. But fifteen days should be deducted from this number to make good the delay caused by the changed conditions, which would still leave the contractor in default twenty-eight days, for which time, under the contract, the appellant was entitled to a demurrage of $280, which the court refused to award him.

These stipulations for liquidated damages have been uniformly sustained by this court since the decision in the case of *Reichenbach v. Sage*, 13 Wash. 364, 43 Pac. 354, 52 Am. St. 51, and no good reason appears why the appellant should not be entitled to the benefit of this provision of his contract. The answer of the respondent to this proposition is that, by reason of the radical changes made in the building, the contract was avoided, and that the appellant was only entitled to recover on a *quantum meruit*. But this position is not tenable. The contract itself made provision for changes during the progress of the work, and in addition to this fact, this suit is brought squarely upon the contract, and the recovery was had and the judgment rendered with reference to the contract price stipulated. The respondent says that, when the court takes into consideration the existing conditions as shown in the statement of facts and the contract,

there is no room for the claim of the appellant to the demurrage. But the damage which accrued to respondent by reason of these changed conditions is covered by the judgment, and cannot be made to play any further part in the proceedings. It is also urged by the respondent that the appellant cannot recover liquidated damages for the reason that he did not stop the work when the time had expired. But he pursued the remedy which was provided in the contract for an emergency of this kind, viz., demanded the liquidated damages specified.

We think, under any theory of the case, that the appellant was entitled to have the judgment offset to the extent that we have indicated, and the judgment will be modified by reducing the amount of the same $280, or it will be reversed with instructions to the lower court to enter judgment for the sum of $560. The appellant will recover the costs of this appeal.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur

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[No. 8494. Department Two. January 25, 1910.]

J. C. GUNBY, *Respondent*, v. L. P. INGRAM *et al.*, *Appellants*.[1]

MORTGAGES—DEFAULT IN INTEREST—MATURING OF WHOLE DEBT—WAIVER. A provision in a mortgage that the whole debt shall become due in case of nonpayment of interest is waived if the mortgagee does not manifest intention to claim it prior to tender of the interest.

SAME—TENDER—AFTER ASSIGNMENT—NOTICE. Where a mortgagor had no notice of the assignment of the mortgage, tender of interest to the mortgagee is sufficient, and prevents exercise of an option to declare the whole debt due.

SAME—TENDER—BY CHECK—SUFFICIENCY. The mailing of a check for interest due on a mortgage is a sufficient tender to pre-

[1]Reported in 106 Pac. 495.

vent the exercise of an option to declare the whole debt due, where all other payments of interest had been made by check, and no objection was made to the character of the money or specie tendered.

MORTGAGES—PAYMENT BY CHECK—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that previous payments of interest on a mortgage note had been made by checks, where the mortgagor so testified according to his best judgment and that such was his custom, the mortgagee did not testify, and there was no other evidence on the subject.

PLEADING—SUPPLEMENTAL COMPLAINT—PREMATURE ACTION. Where an action is prematurely commenced, it cannot be made the basis for a supplemental complaint upon the maturing of the debt.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 27, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Reversed.

*Carkeek & McDonald*, for appellants.

*Karr & Gregory*, for respondent.

DUNBAR, J.—This is an appeal from a real estate foreclosure judgment. On the 5th day of June, 1907, the appellants executed two promissory notes to Lusetta Newell in the sum of $5,000, which notes were secured by a real estate mortgage on certain property belonging to appellants. One note was duly paid and the other note of $2,500 remained unpaid. This note provided for the maturity of the whole debt, in case of nonpayment of interest when due. There was an installment of interest due on the unpaid note on the 5th day of March, 1908. It is claimed by appellants that, by agreement with Lusetta Newell, they were given until April 1 to pay the interest due March 5, viz., $50. It is the contention of the respondent that there was no agreement to this effect, but that Lusetta Newell simply allowed the interest to remain unpaid without taking any action in the matter. But we are satisfied from an examination of the record that there was an agreement to that effect. However, inasmuch

as the appellants did not pay the interest according to the agreement, it seems to be unnecessary to discuss that proposition.

On the evening of the 2d of April appellant L. P. Ingram mailed to Lusetta Newell a check for $50, installment of interest, which it is admitted was received by her on the morning of the 3d day of April. On the 2d day of April Lusetta Newell sold and assigned the note in question to respondent J. C. Gunby, who prepared his complaint in foreclosure and filed the same on the next day, the 3d of April. Lusetta Newell did not apply the check to the payment of the interest due, and in a few days it was sent back to the appellant L. P. Ingram. The appellants were not notified of the assignment of the note to the respondent, excepting constructively by the recording of the assignment and through the service of the complaint. These matters which we have recited were set up in the answer, together with an allegation of tender to the clerk of the court of the $50 due. In July, after the motions and preliminary pleas were made, a supplemental complaint was filed, in which it was alleged that the sum of $2,500 gold coin, or principal sum mentioned in the promissory note spoken of before, together with interest thereon, had become due and payable, and still remained unpaid, and relief was asked accordingly.

It was decided by this court in *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, that an option in a mortgage note to declare the whole debt due for default in payment of interest could not be exercised after lawful tender of an overdue interest installment, and that some affirmative action must be taken by the creditor to announce the election to make due the whole note upon a failure to pay the portion which had become due; and we have decided that the commencement of an action before the tender of the amount due was one way in which such option could be exercised. Much is said in the briefs of respective counsel concerning what was decided in *Coman v. Peters*, 52 Wash. 574, 100 Pac. 1002, but in that

case the doctrine announced above was substantially declared, and that was the main proposition discussed and decided, viz., that whether there be words of option in the agreement or not, such a provision hastening the date of maturity of the whole debt is for the benefit of the payee, and if he does not manifest any intention to claim it before tender is actually made, there is in law no default such as will cause the maturity of the debt before the regular time provided in the agreement. So far as this case is concerned, it is narrowed down to the proposition of whether a legal tender was made prior to the commencement of the action. While it is true that the assignment of this note was made to the respondent before the reception of the check by Lusetta Newell, the appellants had no notice of the assignment, and the sending of the check to Lusetta Newell would be a sufficient tender, so far as the parties are concerned, if it were otherwise good; for the relation of the debtor to the purchaser of the claim, when without notice to the debtor, is legally the same as to the original creditor.

Then, the pertinent question is, Was there a legal tender made to Lusetta Newell by the sending of the check and the receiving of the same by her before the commencement of the action, which it is conceded was the only notice of option given? There was some attempt to show notice by showing that notice had been given to the brother of appellant L. P. Ingram, but we think it was properly excluded by the court; and so far as the record is concerned, it must be conceded that no other notice was given. It may be conceded, we think, under universal authority, that a strictly good tender cannot be made by the offer of a check for the amount due. But it is well established that the creditor may waive the character of the money which is tendered, by raising no objection to the payment for the reason that it is not the character of money or specie that is called for in the obligation, or by raising some other objection which would exclude the idea of objecting on that ground. Consider-

ing the fact, which is a matter of common knowledge, that probably ninety per cent of the business of the mercantile world is now done through the medium of checks, drafts, etc., instead of by the transfer of gold and silver coin or even of any other species of legal tender, it would be a dangerous rule to announce, and one which could easily be turned into an engine of oppression if the tender of a payment, especially where it involved the maturing of obligations which were not then due, could not be made by check, where no question was raised as to the value of the check tendered, and especially, as in this case, where it was shown that the former payments involved in this transaction had been made by checks which were not objected to by the creditor. This state of facts was testified to by the appellant L. P. Ingram; that the payment of the $2,500, which had theretofore been made, and all the payments of the interest had been made in that manner. It is true that, upon cross-examination, he was compelled to admit that he could not remember positively the particular checks that he had issued, but his testimony was to the effect that it was his custom and method to do business through the agency of checks and in no other way, and that according to his best judgment the payments to the creditor had been made by checks. He was asked on cross-examination if he had not paid a certain person gold coin for the benefit of the creditor, and while he would not state positively that he had not, it having been a good while ago, yet he had no recollection of it and still maintained that he had paid by checks, and that no objection had ever been made to them. This person to whom it was intimated he might have paid money was not introduced as a witness in the case, Lusetta Newell herself did not testify on that subject, and the only testimony is that of the appellant Ingram, which bears the impress of truth; and we think it is reasonably established that the payments had theretofore been made through the medium of checks. If that is true, it would be an injustice to the appellants to re-

fuse to apply the payment to the interest due, and mature a large amount of money which was not then otherwise due, without any notification to the appellants of the reason for the refusal. Of course, if the first action was premature, which we are constrained to hold, it is manifest that it could not be the basis for the supplemental complaint which was filed in the case.

The judgment will therefore be reversed and the cause dismissed.

Rudkin, C. J., Parker, Mount, and Crow, JJ., concur.

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[No. 8236. Department Two. January 26, 1910.]

J. H. Sutthoff, *Respondent*, v. Nicola Maruca *et al.*, *Appellants*.[1]

Vendor and Purchaser—Rescission by Vendee—Tender of Price—Necessity. Where the vendor had no title to part of the land, and was unable to procure title within the time called for by the contract, the vendee may rescind and recover purchase money paid without tender of the unpaid balance due; since a vendor does not have a reasonable time to obtain title.

Appeal from a judgment of the superior court for King county, McCredie, J., entered April 17, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

*Blake & Williams*, for appellants.

*Edgar C. Snyder*, for respondent.

Crow, J.—This action was commenced by J. H. Sutthoff against Nicola Maruca, Donatella Maruca, his wife, and James Donofrio, to rescind a contract for the purchase of real estate, and recover, with other damages, $3,000 partial

[1]Reported in 106 Pac. 632.

payments of purchase money theretofore made. On March 21, 1907, one W. A. Sutherland, plaintiff's assignor, entered into a written escrow agreement with the defendants for the purchase of two tracts of land in King county. Deeds for the separate tracts, designated "A" and "B," were deposited with the agreement. The latter deed only is involved in this action. As to it, the escrow agreement, in substance, provided that the defendants should perfect their title and that Sutherland, the vendee, should make the several payments of purchase money on or before December 26, 1907. Shortly thereafter the defendants delivered an abstract of title to Sutherland, which disclosed that they, the vendors, did not have good title, but that the heirs of one Thaddeus Hanford, deceased, held the fee simple title to a strip of land 1.32 feet wide by 165 feet in length, running directly through the premises sought to be conveyed. No title to this strip had been obtained by the defendants on December 28, 1907, and on that date Sutherland, by written notice, rescinded the contract and demanded the return of $3,000 purchase money theretofore paid by him. The trial court, after making findings of fact and conclusions of law, entered judgment in favor of the plaintiff. The defendants have appealed.

Appellants' controlling contention is that the respondent's assignor was not entitled to rescind the contract and recover the partial payments theretofore made by him without tendering to the vendors the remainder of the purchase money, which had become due on December 26, 1907. They insist that, in an action brought to rescind a contract for the sale of real estate, the party who seeks a rescission must either allege and prove performance or tender of performance upon his part, or allege and prove facts showing that such performance or tender of performance would be a vain and useless act. The rule stated is elementary as being applicable to contracts in which final and complete payment of the purchase money and delivery of a deed of conveyance are made concurrent, dependent, and mutual acts, and is sup-

ported by the following cases cited by the appellants: *Underwood v. Tew*, 7 Wash. 297, 34 Pac. 1100; *Tacoma Water Supply Co. v. Dumermuth*, 51 Wash. 609, 99 Pac. 741; *Christy v. Baiocchi*, 53 Wash. 644, 102 Pac. 752.

It is conceded, however, that the appellants were unable to convey good title on December 28, 1907, when Sutherland notified them of his election and determination to rescind. At all times subsequent to the making of the escrow agreement in March, 1907, they had failed to procure title, and had Sutherland tendered them all purchase money due on December 28, 1907, it would have been impossible for them to perform the contract on their part by conveying to Sutherland such a good and marketable title as he was entitled to receive. The respondent alleged:

"That defendants failed, refused and neglected to perfect their title to said land, and that at none of the times herein mentioned nor at any time prior to the commencement of this action have they had good and clear title to said land."

Undisputed evidence produced at the trial sustains this allegation. In fact the appellants admit that their title was defective, but insist that, in the absence of any tender of the purchase money by Sutherland, they were entitled to a reasonable time after December 26, 1907, within which to perfect it. There might be some merit in this contention but for the fact that Sutherland elected to, and did, rescind. It being conceded that appellants could not convey good title within the time stipulated in their contract, Sutherland was entitled to rescind without tendering the remainder of the unpaid purchase money. The law does not require the performance of an idle or useless act. In *Walsh v. Colvin*, 53 Wash. 309, 101 Pac. 1085, this court said:

"While a vendor may have a reasonable time in which to prepare and deliver a deed, he does not have a reasonable time in which to acquire title to the property to enable him to perform his contract. If a vendor agrees to convey title at a given time, and has no title when the date for performance arrives, the question of a reasonable time for preparing

a deed does not enter into the case. There is a breach of the agreement to convey for which the purchaser may at once rescind. *Goetz v. Walters*, 34 Minn. 241, 25 N. W. 404; *Gregory v. Christian*, 42 Minn. 304, 44 N. W. 202, 18 Am. St. 507; *Primm v. Wise*, 126 Iowa 528, 102 N. W. 427; *Webb v. Hancher*, 127 Iowa 269, 102 N. W. 1127; *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, 20 Am. St. 213."

That under such circumstances a rescission may be made and partial payments of purchase money may be recovered, without tendering the entire amount due, see, also, *Holmes v. Holmes*, 12 Barb. 137; *Spaulding v. Fierle*, 86 Hun 17, 33 N. Y. Supp. 402; *Glenn v. Rossler*, 88 Hun 74, 34 N. Y. Supp. 608; *Lawrence v. Taylor*, 5 Hill 107.

In *Holmes v. Holmes, supra*, the court said:

"The obligations of the parties were mutual. The defendant was to convey and assure the title, and the plaintiff was to execute and deliver the mortgage and pay the residue of the purchase money. The covenants are dependent, for the conveyance and the securing and payment of the purchase money were to be simultaneous acts. When there is an existing capacity in the party who is to convey, to give a good title, his obligation is not perfect until the party who is to receive the conveyance produces and offers to pay the purchase money. But where there is the entire absence of a capacity to give a good title, I apprehend no such production and offer is required. What the books denominate a waiver of any of the formalities of a tender, is but the annunciation of the same rule, under another name. . . Unless the law, in regard to contracts for the sale of real property, has come to be a repetition of useless and unmeaning ceremonies, a contracting party who suffers the subject of the contract to be charged with incumbrances of his own creation, or to remain charged with those created by others, in breach of his covenant to assure a good title, as fully and effectually waives and relieves the covenantee from the actual production and offer of the purchase money, as he could do by the use of express words, or by any other means within his power. When he has no title, or his title is defective, at the time when the conveyance is to be made, any condition precedent, such as tendering, paying, or securing the purchase money, need not be fulfilled."

Under the facts proven in this case, the respondent's vendor was entitled to rescind without tendering any further payment of the purchase money. The judgment is affirmed.

RUDKIN, C. J., MOUNT, DUNBAR, and PARKER, JJ., concur.

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[No. 8110. Department One. January 26, 1910.]

## CHARLES H. COLPE *et al.*, *Respondents*, v. ERIK O. LINDBLOM *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—RESCISSION BY VENDEE—TENDER OF PRICE—NECESSITY. Where the vendor's wife was insane and incapable of executing the deed, the vendee may rescind a contract for the purchase of community property without tender of the unpaid purchase price; since a vendor does not have a reasonable time to obtain title.

VENDOR AND PURCHASER—RESCISSION BY VENDEE—WAIVER—TIME FOR PERFECTING TITLE. Where it develops that a vendor's wife is insane, the vendee's request that a guardian be appointed to make the conveyances waives his right to a rescission and grants a reasonable time within which to perfect the title.

SAME—REASONABLE DILIGENCE. A vendor did not proceed with reasonable diligence in perfecting his title, so as to avoid a rescission by the vendee, where he was requested in May to secure the appointment of a guardian to make conveyance for his insane wife, the petition therefor was not filed for three months, and an order of sale not made until late in December; especially where just before the order for sale he insisted upon the vendee's taking title as it was.

SAME—TENDER OF PERFORMANCE. After notice of rescission by the vendee for failure to perfect the title within a reasonable time, tender of performance by the vendor comes too late.

HUSBAND AND WIFE—PROPERTY—DOMICILE. The law of the domicile controls personalty acquired during coverture.

HUSBAND AND WIFE—COMMUNITY PROPERTY—ACQUISITION IN ANOTHER STATE—WHAT LAW GOVERNS—PRESUMPTIONS. Where a husband and wife, married in Arizona seventeen years ago, were keeping house at Nome, Alaska, where his earnings were his separate property, and there was nothing to show whether Nome was their

[1]Reported in 106 Pac. 634.

domicile or merely their temporary abode, it will be presumed that the domiciliary law was the same as our own, and that the property was community property.

ESTOPPEL—AS TO TITLE—BY PLEADING—HUSBAND AND WIFE—VENDOR AND PURCHASER. Where a vendor, in order to complete a sale, secured the appointment of a resident guardian for his insane wife in California, stating in the petition that the property was community property, he will be estopped from asserting that it was his separate estate and that his wife had no interest therein.

VENDOR AND PURCHASER—MARKETABLE TITLE. A contract to convey a good marketable title, free from defects, as shown by abstract of title, is not fulfilled by a deed of land acquired during coverture, executed by the husband alone, whose domicile is not disclosed, his wife being insane and his claim to the land as separate estate not being deducible of record, as it is not free from probable litigation.

VENDOR AND PURCHASER—RESCISSION BY PURCHASER—DECREE—RELEASE OF CONTRACT. Upon entering a decree for the rescission of a contract for the sale of land, the parties must be placed in *status quo*, and the court should direct the vendee to execute a release of the contract.

Appeal from a judgment of the superior court for King county, Gay, J., entered January 25, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

*Roberts, Battle, Hulbert & Tennant* and *C. J. France*, for appellants.

*Edgar C. Snyder* and *George E. de Steiguer*, for respondents.

Gose, J.—On January 31, 1907, the appellants entered into a written contract with the respondents in the words following, omitting signatures and acknowledgment:

"REAL ESTATE CONTRACT.

"San Francisco, January 31, 1907.

"Received from Herbert V. Perry and Chas. H. Colpe the sum of five thousand ($5,000) dollars as deposit for the purchase by them from us of the Washington Block, situated on First Avenue, Seattle, King County, Washington, legally described as follows:

"The purchase price of said property to be two hundred

fifteen thousand ($215,000) dollars, net to us, payable by purchasers as follows: $5,000 deposit money, receipt whereof is hereby acknowledged; thirty thousand ($30,000) dollars cash on delivery by us to purchaser of warranty deed; forty thousand ($40,000) dollars cash on or before one year thereafter, with interest thereon at six per cent per annum, interest payable semi-annually; forty thousand ($40,000) dollars cash on or before two years thereafter at six per cent per annum, interest payable semi-annually; and one hundred thousand ($100,000) dollars by assumption of first mortgage now against said property payable on or about January 1st, 1908, and bearing interest at 5 per cent per annum, payable quarterly. Abstract of title, certified to said purchasers showing good and marketable title in said property and the whole thereof in us, to be delivered to purchasers within ten days after March 28, 1907, and said purchasers shall be allowed fifteen (15) days for examination thereof, wherefor they agree to complete the purchase of said property in accordance herewith, and thereunto pay to us the sum of thirty thousand ($30,000) dollars additional cash and therefor to execute to us a second mortgage of eighty thousand ($80,000) dollars payable as hereinbefore provided for. In case title is not good, or there are any defects of title as shown by said abstract, and said title cannot be made good or said defects of title cannot be cured, then the said $5,000 cash paid to us on the signing of this receipt shall be returned to said purchasers and this receipt be cancelled. This receipt consists of two (2) pages and this page is the second page thereof. In case title is good and marketable and with no defects and if purchasers shall then fail to close the deal and pay $30,000 cash as herein agreed, then said purchasers will forfeit to us said $5,000 cash and this receipt shall be void and of no effect. Purchasers to receive rents of said property from the date of deed to them and to rebate to us unearned premium of insurance policy. Property to be delivered free of any taxes or assessments or liens to date of deed. Interest to be paid by purchasers from date of deed."

The abstract of title was delivered to the respondents in due time, and by them submitted to their attorneys for examination. About May 1 the respondents ascertained that the wife of the appellant Dawson was insane and confined in

a sanitarium in the state of California. They thereupon consented that a guardian be appointed for her, in order that her interest in the property might be conveyed. The appellant Dawson at first contended that his interest in the real estate was his separate property. However, on May 25, he filed in the superior court of King county an authenticated copy of his letters of guardianship, theretofore issued in the superior court of the county of San Francisco, state of California. The respondents' counsel thereupon took the position that it was necessary to have a resident guardian appointed. Thereafter, and on August 13, a petition was filed in the superior court of King county, in which the appellant Dawson united, praying the appointment of a resident guardian. On the same day a show cause order was entered, fixing October 17 as the day for a hearing on the petition. On November 1, an order was entered appointing a resident guardian. On December 17 appraisers were appointed, and on December 19 an inventory was filed and the estate appraised. On December 24 a petition for a show cause order and a sale of the real estate was filed, and on December 26 a show cause order was made and entered, fixing February 7, 1908, as the date for hearing on the petition. On December 26 the respondents, not having notice of the filing of the last named petition or the entry of the order thereon, gave the appellants written notice that they elected to rescind the contract which, omitting signatures, is as follows:

"December 26, 1907.

"To Erik O. Lindblom and Richard B. Dawson,
"San Francisco, California:

"You and each of you, will take notice that, because of your having failed, refused and neglected to perform the contract you made with us on the 31st day of January, 1907, for the sale and transfer to us of the Washington Block on First Avenue, in the city of Seattle, Washington, free from all encumbrances, except a certain mortgage specified in said contract, we have elected to rescind and do hereby rescind the said contract and every part thereof; and you will also take notice that, in addition to the sum of five thousand dol-

lars ($5,000) paid to you in consideration of the execution of said contract, we have suffered other losses on account of your said breach of contract, in the sum of seven thousand dollars ($7,000) and we do hereby demand of you that you forthwith pay to us twelve thousand dollars ($12,000)—being the sum of said consideration and said additional loss or damage—together with such legal interest as may be properly chargeable on the various portions of said sum."

On January 17, 1908, the wife of the appellant Dawson was discharged from the sanitarium, and on April 1 the appellants tendered performance. On January 25 this suit was commenced for the recovery of $5,000 paid by the respondents on the contract, terminating in a judgment in their favor. The judgment has been brought here for review by an appeal.

The first error assigned is that, under the contract, the payment of the purchase price and the execution and delivery of the deed are concurrent acts, and that the respondents, before declaring a rescission, were required to tender performance. Admitting this as a general rule, the inquiry is, is it applicable in this case. It is conceded, that the appellants own the property in equal shares; that the appellant Dawson was a married man at the time he acquired the property, and that, at the time of the execution of the contract and continuously thereafter until after the respondents gave notice of their election to rescind, his wife May Dawson was insane and incapable of doing business. It is well settled in this state that property acquired by either spouse after marriage is presumed to be community property. Assuming for the present that the interest of the appellant Dawson in the property was of a community nature, it becomes apparent that a tender of performance would have been a useless thing. The appellants, as the respondents knew, could not then convey a good, marketable title free from defects, as they had engaged to do.

"Readiness and willingness to perform on their part would take the place of actual performance, and a formal tender

was waived." *Kane v. Borthwick*, 50 Wash. 8, 96 Pac. 516, 18 L. R. A. (N. S.) 486.

See, also, *Sutthoff v. Maruca*, *ante* p. 102, 106 Pac. 632; *Hartley v. James*, 50 N. Y. 38.

The court found:

"(5) That upon the plaintiffs ascertaining the defects in the title to said property, they notified defendants thereof and demanded of the defendants that they perfect their title to said property, in order that they might convey good title to the plaintiffs according to the terms of said contract.

"(6) That, although the plaintiffs were at all times ready, willing and able to perform said contract, and had offered so to do, the defendants had failed, refused and neglected to perfect their title to said property, and at none of the times mentioned in the complaint, nor at any of the times down to this date have the defendants had good and marketable title to said property."

The finding that the respondents were ready and willing to perform is abundantly supported by the evidence. Upon discovering the insanity of the wife, about May 1, 1907, they demanded that the appellants proceed with diligence in order that they might convey a marketable title. Several conferences were held between counsel for the respective parties and, tiring of the delay, the respondent Perry went to San Francisco about the middle of December, 1907, to ascertain from the appellants the cause of the delay. He testified that the appellant Dawson finally said to him that he must take such title as the appellants could then convey, and that his wife "could write as well as he could, even though she were insane;" that she would unite in the deed. It is obvious that the deed of an insane woman would not convey a marketable title. When the respondents ascertained that the wife of one of the parties had been adjudged insane, they could have rescinded at once. While time is not made the essence of the contract, the appellants were bound to convey within a reasonable time.

"If a vendor agrees to convey title at a given time, and has no title when the date of performance arrives, the ques-

tion of a reasonable time for preparing a deed does not enter into the case. There is a breach of the agreement to convey for which the purchaser may at once rescind." *Walsh v. Colvin*, 53 Wash. 309, 101 Pac. 1085.

By analogy the rule thus announced applies to this case. The appellants did not have a good, marketable title which they could convey, either when the contract was made or at the time of the rescission.

The next question to be considered is, Did the respondents waive their right to rescind by calling upon the appellants to perfect a marketable title? The attorney who conducted the negotiations for the respondents testified that the appellants' counsel assured him that the guardian's sale would be effected within sixty or ninety days. This assurance was given some time in May, 1907. The latter testified that the time stated was only an estimate. We think the answer is that they consented that the appellants should have a reasonable time in which to procure the title at a guardian's sale. The record, however, discloses that the appellants did not proceed with reasonable diligence. Had they done so, the guardian's sale could have been effected, if at all, before the date of the election to rescind.

Referring again to the testimony of the respondents' counsel, we find that about May 25 he demanded the appointment of a local guardian, and refused to accept any title proceeding from a sale made by the foreign guardian. The petition for the appointment of a resident guardian was not filed until some three months later. It will be observed that the consideration to be paid for the property was $215,000. Admittedly the respondents could not be required to hold themselves in readiness indefinitely to pay this sum. Moreover the evidence tends to show that the appellant Dawson, a few days before the rescission, notified respondents that they must accept the title as it stood or not take it at all. He denies that he made this statement, but its truth is in harmony with the act of the respondents in

giving notice of the rescission a few days later. We think the respondents were entitled to rescind on the ground of lack of reasonable diligence in the prosecution of the guardianship proceedings, and on the further ground that the appellants insisted on their taking a defective title. It follows that the subsequent tender of performance came too late to be of any avail to appellants.

In *Hawes v. Swanzey*, 123 Iowa 51, 98 N. W. 586, cited by the appellants, it was held that, when the vendees discovered a defect in the title and did not demand a return of the advanced payment, and by frequent inquiries as to the progress made in the efforts of the vendor to perfect title they impliedly consented to a reasonable time to enable the vendor to cure the defects, and that having thus acquiesced in the delay "until the title was in fact perfected according to their demands and until plaintiff was fully prepared to comply with the contract on his part, equity will not allow defendants to assign that delay as a reason for absolving them from its performance on their part." In *Bales v. Williamson*, 128 Iowa 127, 103 N. W. 150, also cited by the appellants, the vendee made the first payment when the contract was executed, and the second payment August 15, 1902. The final payment was due March 1, 1903. In November, 1902, the vendors furnished the vendee an abstract of title, which was submitted to an attorney, who gave an opinion pointing out various defects in the title. In February, 1903, a corrected abstract was given to the vendee. On February 28 the vendor tendered a warranty deed, and on March 3 demanded payment. The vendee declined to make payment, insisting that the title was still defective. On March 13 the vendee gave the abstract to another attorney who, on March 16, advised that the defect be cured by an action to quiet title. The vendors, acting upon this advice, commenced an action which resulted in a decree quieting the title on September 2, 1903. Pending the action and on July 27, the vendee com-

menced an action to rescind the contract and to recover the purchase money paid thereon. It was held that, the action to quiet title having been commenced at the instance of the vendee and having been conducted to a judgment "with due diligence," he could not change front and rescind.

The appellants urge that the interest of the appellant Dawson in the premises was his separate property. The evidence which forms the basis for the contention is that the money which Dawson put into the property was earned by him at Nome, Alaska, and that, under the laws of that place, his earnings were his separate estate. The record discloses that both the husband and wife were at Nome, he working at different things, as she expressed it, and she keeping house. The wife further testified that the marriage occurred at Phoenix, Arizona, about seventeen years before the trial. We have not been able to discover from the record whether Nome was their domicile or merely their temporary abode. As we have stated, in this state the presumption is that all property acquired by either spouse after marriage is community property. This rule is so well established that the citation of authority is not necessary. The law of the domicile controls as to personal property acquired during coverture. *Thayer v. Clarke* (Tex. Civ. App.), 77 S. W. 1050. In the absence of evidence as to the domicile of the parties at the time the money was earned, the presumption will be indulged that the domiciliary law is the same as our own. *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736. *In Elliott v. Hawley*, 34 Wash. 585, 76 Pac. 93, 101 Am. St. 1016, cited by the appellants, the record shows that the husband had not been in this state for ten years preceding the trial, and that the wife, who was asserting the separate character of the property in litigation, had never been a resident of this state. In *Brookman v. Durkee*, 46 Wash. 578, 90 Pac. 914, 123 Am. St. 944, 12 L. R. A. (N. S.) 921, also cited by the appellants, the opinion states that the husband and wife were domiciled and had their

residence in the state of New York when the consideration for the property was acquired.

After the respondents had refused to take the title without the wife's interest being conveyed, as we have pointed out, a resident guardian was appointed. In the petition for the appointment, united in by the husband, it was alleged that the interest of the husband and wife in the property was a community one. In the light of the acts of the appellant Dawson and the averment as to the nature of the title in his sworn petition, he will not now be heard to say that the wife had no interest in the property. Moreover, the contract required the appellant to convey a good, marketable title, free from defects, and it cannot be said that such a title could be conveyed by the deed of the husband alone. A title to be a marketable one must be one which a prudent investor, well informed as to the facts and their legal bearing, ready and willing to perform his contract, would be willing to accept. Such a title must be free from probable litigation and, except in rare cases, must be fairly deducible of record. 29 Am. & Eng. Ency. Law (2d ed.), 613. A "good title free from incumbrances as shown by a complete abstract of title" must be title disclosed by the records. A title based upon an *ex parte* affidavit showing the names of the heirs of the deceased owner is not such a title. *Crosby v. Wynkoop*, 56 Wash. 475, 106 Pac. 175; *Watson v. Boyle*, 55 Wash. 141, 104 Pac. 147.

It is finally contended that the respondents could not rescind without first cancelling, or offering to cancel, the contract which had been filed for record. The judgment recites that the contract has been rescinded by the respondents, and that it is of no further force or effect. The complaint sets forth the contract *in haec verba*, and alleges that the respondents have elected to rescind. The doctrine of *status quo*, as applied to this class of cases, is that the adverse party must be placed in substantially the same position he occupied before entering into the contract. This

may be provided for in the judgment. Maupin, Marketable Titles, § 279; *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609. The judgment is a bar to any future action between the parties to the action and those concluded by it. *Carter v. Fox* (Cal. App.), 103 Pac. 910. Following the rule announced in *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583, we will direct that the judgment below be modified so as to suspend the issuance of an execution until the respondents shall execute a sufficient release of the contract and deposit it with the clerk of the superior court for delivery to the appellants.

The Washington Block is a business block situate on First avenue in Seattle. At the time of the execution of the contract, there were at least two unexpired leases upon the property, which the respondents insisted, and still insist, were incumbrances. They further urge that it was the duty of the appellants to procure their release in order to make the title marketable. Several conferences were held between the attorneys for the respective parties at which the leases were discussed and tentative propositions were made and considered. A reading of the evidence convinces us, however, that there was no meeting of minds of the contracting parties in this matter subsequent to the execution of the contract. The leases, under the holdings of this and many other courts, were an incumbrance upon the property, and the appellants' title was not a good, marketable title free from defects. However, the concluding clause of the contract provides: "Purchasers to receive rents of said property from the date of the deed to them." Whether this provision modifies that part of the contract providing for a good, marketable title is an interesting and important question which we do not find it necessary to decide. The case will be remanded with directions to modify the judgment so that the issuance of the execution will be suspended until the respondents have filed a release of the contract as herein provided. In all other respects the judgment will be affirmed.

Rudkin, C. J., Fullerton, Morris, and Chadwick, JJ., concur.

[No. 8422. Department One. January 26, 1910.]

# W. J. PICKERING, *Respondent*, v. H. G. RICHARDSON, *Appellant*.[1]

APPEAL—PARTIES ENTITLED TO APPEAL—RECEIVERS. A receiver representing creditors, and defending an action to foreclose a chattel mortgage on the property, is entitled to appeal from the judgment.

RECEIVERS—ACTIONS AGAINST—CHATTEL MORTGAGES—ESTABLISHMENT—PROCEEDS OF PROPERTY SOLD. After a receiver's sale of personal property under an order of court in the receivership, it is error to allow a mortgagee to prosecute an action to foreclose a mortgage thereon and allow attorney's fees provided in the mortgage; since the mortgage lien could have been established in the receivership, and after the receiver's sale becomes a lien to be allowed against the proceeds without the penalty for attorney's fees and unnecessary costs of the independent action.

Appeal from a judgment of the superior court for Thurston county, Rice, J., entered June 19, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in consolidated actions for the foreclosure of chattel mortgages. Affirmed in part and reversed in part.

*Troy & Sturdevant*, for appellant.

*D. C. Conover*, for respondent.

CHADWICK, J.—The plaintiff in this case instituted two actions against defendant Richardson as receiver of the Shore Lumber Company, and others, to foreclose two certain chattel mortgages covering property which had formerly been in the possession of the Shore Lumber Company, but had been sold by the receiver under an order of the court made in an action prosecuted by McIntosh & Swan against the Shore Lumber Company and H. Wilson. These actions were begun against the receiver after permission of the court had been first obtained. The first mortgage covered certain sawmill

[1]Reported in 106 Pac. 614.

machinery which had been leased to the Shore Lumber Company by the Bates Brothers Lumber Company. The Shore Lumber Company, in which the Bates Brothers were stockholders, being embarrassed, sold this machinery to one H. Wilson, who made a note and mortgage for $900 direct to plaintiff, who was a creditor of the Bates Brothers Company. The second mortgage covered certain logs and lumber formerly owned by the Shore Lumber Company. This mortgage was made by H. Wilson in favor of R. W. and O. G. Bates, and by them assigned to plaintiff. These actions were consolidated for trial. Judgments were rendered in favor of plaintiff. One appeal is prosecuted so that both cases are before us for review. The receiver's sale is not now attacked. Plaintiff asserts that he is seeking only to subject the proceeds of the sale to the satisfaction of his judgments. The record shows that other claims against the property have been asserted in the receivership case.

A motion is made to dismiss the appeal, for the reason, as it is alleged, that a receiver has no right of appeal. In some cases, as for instance from an order distributing the funds of the estate, it is usually held that a receiver has no right of appeal; but where the duty is put upon him of defending the assets of the estate or protecting it from unwarranted or unlawful claims, we do not understand that this right has ever been denied. Alderson, Receivers, § 246; Beach, Receivers, §§ 295, 296; *Bosworth v. Terminal R. Ass'n*, 80 Fed. 969; *Felton v. Ackerman*, 61 Fed. 225; 17 Ency. Plead. & Prac., 874.

See, also, *Hallam v. Tillinghast*, 11 Wash. 20, 52 Pac. 329. The motion to dismiss is denied.

This brings us to the main issue. Without deciding that it was proper practice, but admitting for the purpose of this case that respondent had a right to institute the two independent actions against the receiver, we think that the judgments of the court cannot be allowed to stand without some modification. Although a sale had occurred, the property—

the proceeds of the sale—was, at the time these actions were instituted, in the custody of the court. It is not consistent to hold to any rule that would authorize a trial court in thus putting its two arms in conflict or in combat to the disadvantage of its own agent. Respondent had his remedy and might have sought it in the receivership proceeding, which from its very nature is an invitation to all who have claims against, or assert an interest in, the property of the estate. Respondent ratified the sale, and thus forfeited any right that he might have theretofore had to foreclose against the property. There was nothing to foreclose. The object of a foreclosure is to sell specific property to satisfy a lien upon it. The property being sold by a court of competent jurisdiction, the sale being ratified, and the funds being in the hands of an officer of the court, respondent's remedy was against the fund, and the trial court should have thus directed the proceeding rather than permitted the independent actions which could result in nothing but added expense and embarrassment to the estate and funds under its control. For that reason we shall not allow any costs, other than what is known as court costs, upon the $900 mortgage, which was properly adjudged a lien on the proceeds of the sale. We can give no more effect to the judgment than to hold that it is an establishment of the claim to the amount due on the $900 note with interest and court costs, but without the attorney's fee provided in case of suit; for the suit was unnecessary, and the attorney's fee operates only as a penalty. This cannot be allowed as against others who have an interest in the insolvent estate.

The point is also made that there is nothing in the record to show that Wilson ever obtained title to the lumber and logs, the property described in the $300 mortgage made by him in favor of Bates Brothers. Respondent says in his brief that the testimony of respondent shows that he did have title, but a careful reading of the testimony fails to disclose anything that would warrant such a finding. Mr.

Pickering disclaims any knowledge of the sale to Wilson by the Shore Lumber Company. This mortgage was made to R. W. and O. G. Bates, but there is nothing in the record to show that the Shore Lumber Company ever transferred the property to the Bates Brothers or to Wilson. Upon the present record the amount realized from the sale of the property described in the $300 mortgage is rightfully in the hands of the receiver and subject to the debts and expenses of administration of the insolvent estate.

The judgment of the lower court, in so far as the $900 mortgage is concerned, will be affirmed, less the amount of attorney's fees allowed by the court. As against this amount appellant may offset the actual cost of advertising and conducting the sale of the sawmill property, without any allowance for attorney's fees. *Brundage v. Home Sav. & Loan Ass'n*, 11 Wash. 288, 39 Pac. 669. The lower court will find this item and enter judgment accordingly. In so far as the court has adjudged the foreclosure of the $300 mortgage and directed payment out of the funds in the hands of the receiver, its judgment will be reversed. Appellant will recover costs on appeal.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8470. Department One. January 26, 1910.]

# CHRISTINE OHRSTROM *et al.*, *Respondents*, v. THE CITY OF TACOMA, *Appellant*.[1]

ELECTRICITY—NEGLIGENCE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence on the part of a city in failing to ground secondary circuits connected with its high voltage primary circuits, and in failing to cut off the circuit after notice of danger, where it appears that the city had notice of a ground on the primary circuit which allowed the high voltage to flow into the secondary system, where it was very dangerous to human life, and failed to cut out the circuit as it might have done by turning a switch, that its electrical code declared the danger, stating that it could be obviated by grounding the secondary circuits, and that the National Board of Fire Underwriters had called the city's attention to the dangerous conditions, and recommended grounding the secondary circuits.

SAME—EVIDENCE OF DEATH. There is sufficient evidence to establish that plaintiff's decedent met his death by coming in contact with a city electric system, where it appears that he was employed by the company whose circuit was charged with a high voltage by reason of a ground, that deceased was the first to turn on the electric lights in the morning, and was in the habit of doing so at a place where dampness made a good conductor, that he started for such place according to his custom, when he was heard to shout and staggered, coming from the electric light and fell near the light and was picked up immediately and found to be dead, his left hand was burned, a physician gave the cause of his death as electric shock, and his body had the appearance produced by death from electric shock; the deceased being in good health, no other cause for death being shown, and others having received shocks the same morning on the same circuit.

SAME—EVIDENCE OF DEATH—ADMISSIBILITY. In an action for death caused by contact with an overcharged secondary electric circuit supplying several establishments, it is competent, on the question of the dangerous condition of the circuit and of the city's negligence, to show that another man in one of the other establishments on the same circuit was found dead from an electric shock, a few moments before; and the evidence cannot be excluded because of its tendency to prejudice the jury.

DEATH—EXCESSIVE DAMAGES. A verdict for the death of a husband and father, for $27,000, reduced by the trial court to $18,000,

[1]Reported in 106 Pac. 629.

is still excessive, and should be reduced to $12,000, where the deceased was thirty-nine years of age and earning a salary of seventy-five dollars a month in a grocery store.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered July 12, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, for $18,000, in an action for wrongful death. Reversed, and a new trial ordered unless $6,000 is remitted.

*T. L. Stiles*, *F. R. Baker*, and *F. A. Latcham*, for appellant.

*Loveday, Kelley & McMillan*, for respondents.

MORRIS, J.—John Ohrstrom, husband and father of respondents, died in the Younglove Grocery Company's store, Tacoma, on February 1, 1909. Claiming such death resulted from contact with appellant's heavily charged electric light system, the action was brought, and resulted in a verdict for respondents, and appellant, alleging error, appeals.

The chief assignments of error upon which appellant relies are in the admission of testimony, in the instructions, and insufficiency of the evidence to justify the verdict. The last two assignments raise the same question, and will be treated together. The negligence charged in the complaint consisted in the neglect and failure of appellant to cut off or ground one of its secondary circuits after permitting the same to become negligently overcharged and dangerous to life. At the conclusion of the evidence, the appellant requested an instruction from the court to the effect that plaintiffs had failed to show any negligence on the part of the city, or to connect the city in any way with the death of John R. Ohrstrom, which instruction was refused. For a proper discussion of this instruction and the error suggesting the insufficiency of the evidence, it becomes necessary to refer to the established facts: (1) with reference to the negligence of the city, and (2) whether the evidence justifies a

finding that such negligence was the cause of John R. Ohrstrom's death.

The city of Tacoma receives its power for electric lights from outside the city. This power is distributed from a central station, by primary circuits carrying a current of 2,300 volts. One of these primary circuits is called the Lower Pacific Avenue circuit, and upon it, at intervals, secondary circuits are cut in, to which current is supplied through a transformer which reduces the current upon the secondary circuit to 220 volts. These secondary circuits are known as the "three wire" type, and consist of two live and one dead wire called the neutral, and whenever a live wire is brought into circuit with a neutral, the current is further reduced to 110 volts. One of these secondary circuits, cut in on the Lower Pacific Avenue primary circuit, supplies the Younglove Grocery Company and other consumers, among them the West Coast Wagon Company. At the central station there is an appliance called the ground detector, the purpose of which is to signal by means of a red light whenever there is a contact between the wires of the primary and secondary circuits with faulty insulation, or for other reason there is a ground. This is indicated by the burning of the light in a red lamp, the strength of the light or its continuance depending on the completeness of the ground; and whenever this is indicated, the operator may, by throwing switches, detect the particular circuit at fault. Whenever there is a ground upon one of these primary circuits, any conducting substance will carry a current of 2,300 volts, and if the secondary circuit be affected, there would be a current of 1,150 volts, rendering such wires and their connection excessively dangerous, as 500 volts is ordinarily fatal to human life.

On the morning of January 31, at about 8:30, the operator in charge at the central station detected a ground, which came and went intermittently until about 2 p. m. Not considering it dangerous, he did not pull the circuits to ascertain the location of the trouble, nor did he make any report. At

4 p. m. he was succeeded by another operator, who detected a permanent ground and, pulling the circuits, ascertained the trouble to be upon the Lower Pacific Avenue circuit, and this fact he reported to the city electrician who instructed other assistants to go out and locate the trouble. The first crew went to work about 4:30, and worked until dark, but could not detect the trouble. A second crew commenced between six and seven o'clock, and continued to work until ten o'clock, when being unsuccessful, they quit, and reported their inability to find the trouble, at the central station. Nothing further was done by the city. The operator in charge at the central station, although he knew the trouble was upon the Lower Pacific Avenue circuit, continued that circuit in full operation, and made no attempt to render the same harmless, which could easily have been done by pulling the circuit and cutting off the current. An ordinance of the city is in evidence adopting the National Electric Code for the government of electric appliances in the city of Tacoma, wherein it is advised that:

"If the primary and secondary coils of a transformer come into contact electrically, the high voltage primary current may flow to the secondary system. If this should happen, the life of any one handling any part of the second system would be endangered. . . . If, however, the secondary coil is grounded, a breakdown in the transformer cannot cause a dangerous difference of potential between the secondary system and the ground, and only with certain unusual combinations of contacts between primary and secondary wires outside of the transformers will this protection fail to prevent the voltage of the secondary system from being raised above its normal limit. In order to secure the full benefit of the ground connection, reliable primary fuses of proper carrying capacity must be provided. The middle of the secondary coil is the proper point to ground, as there is then only half the normal secondary voltage between either side and the ground, thus reducing the liability of a breakdown of insulation, and also materially lessening the danger of fire if a breakdown does occur."

It is also shown that, about five years ago, the representative of the National Board of Fire Underwriters called the attention of the city council of Tacoma to the dangerous condition of the overhead wiring, and recommended the grounding of secondary circuits. This evidence was sufficient to submit the question of the appellant's negligence to the jury, in failing to ground the secondary circuit, and in failing to render the same harmless by cutting off the current after it had knowledge of the danger.

We will next examine the testimony with reference to its sufficiency in showing that the deceased met his death by coming in contact with appellant's electric system. The deceased was in the employ of the Younglove Grocery Company, which, as we have seen, was supplied by this secondary system, wherein it was subsequently discovered the fault was. It was his habit, upon reaching the store in the morning, to go to the toilet, which was located at the rear of the store and underneath the sidewalk. The toilet was lighted by an electric light hanging in the doorway, and directly over an iron plate or threshold. The storeroom, just outside the toilet, was used for storing kegs of salt fish, and the salty solution from these kegs was upon the floor and this iron threshold, and gave to that part of the store a general salty dampness which it is said is a good electrical conductor. The deceased, says one of the witnesses, was always the first to turn on this electric light every morning.

On the morning of February 1, at about 7:30 o'clock, as was his custom, he started for the toilet. Another employee of the store who was about twenty-five feet to the rear of deceased, says that he heard him "give a shout, a yell like pain," and he "staggered and fell," and that when he staggered he was coming from the electric light and close to the light. The light was not on and it was dusk. He could not see his hands, but it was "just like he would take hold of the light and go away from it." The deceased was immediately picked up and placed upon some boxes, and was apparently dead.

One witness says the body had an odor like burnt leather; another detected an odor like something had been burning. Physicians were immediately called and found life extinct. One, Dr. Love, testifies the body was in a cyanosed condition; it was blue all over, and that he noticed a burn on the left hand; "I made only a slight examination. I could see he had been burned," and that he determined the cause of death as an electric shock. The other physician testified that he was called from the West Coast Wagon Company, two doors south, where only a few minutes before he had been called to attend a man who had been found dead, who had died from a shock and in such a condition as would be produced by an excessive electric shock; that he found a wound on the palm of Ohrstrom's hand that looked like a deep, wide cut; could not say whether it was a burn or cut, but that from its nature it could have been produced by an electric shock; that persons killed by electric shock are apt to show a wound or cut at the point of contact, but that death may result from such shock without any external evidence of a burn; that "in this particular case death being caused immediately, there was no attempt in the tissues to produce the usual reaction, which you would get with a burn in living flesh, inflammatory action set up; it is almost like the effect of a current upon a dead body is was so instantaneous." Another employee testified that, at about the same time, he went into the shipping office, having his rubbers on, and turned on an electric light, and that in doing so he felt a distinct shock, so much so that he gave expression to it and said: "Gee, that tickles." Other testimony shows that the deceased was in his usual good health and spirits when he reached the store that morning. This testimony was sufficient to submit to the jury the question whether the deceased received a shock while in the act of turning on the light.

In order to establish this fact it was not necessary to produce testimony of the actual contact between his hand and the light. It was sufficient if, from all the circumstances there

present and as testified to by the various witnesses, there was a preponderance of evidence to convince the jury that he did come in contact with the electric light, and in so doing received a shock which caused his death. This was not a case such as appears in many of the cases relied upon by appellant, where death might have occurred from several present causes, for some of which a defendant might be responsible and for others not, and it was held that the jury should not be permitted to speculate as to which one of these causes produced death. Here there was no other cause shown in the evidence which might have produced the condition existing. The mere fact that the physicians testified that persons may die from other causes or shocks producing some of the conditions here found was not sufficient to bring the case within the rule contended for by appellant, without some evidence of the existence or presence of some of these causes. Neither, in cases of this character, do the authorities demand proof of actual contact in order to fix liability for death or injury from an electric shock.

In *Clements v. Louisiana Elec. Light Co.*, 44 La. Ann. 692, 11 South. 51, 32 Am. St. 348, 16 L. R. A. 43, there was no eyewitness, and no one could be produced, who could tell how the accident happened. Yet the court says: "But we think from all the attendant circumstances that he was either stepping over the wire or going under it." So, in the case before us, the jury were, from all the attendant circumstances, justified in believing that the deceased received a shock while attempting to turn on the light.

In *Illingsworth v. Boston Elec. Light Co.*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552, there was evidence that the plaintiff's hands were burned by electricity, and it was held sufficient for the jury to find that the accident resulted from touching an uninsulated wire. In *Brown v. Edison Elec. Illuminating Co.*, 90 Md. 400, 45 Atl. 182, 78 Am. St. 442, 46 L. R. A. 745, a boy was sent up to clean a roof, and shortly afterwards was found there insensible in contact with an

electric wire. No one witnessed the accident. The boy testified that he was stooping over the edge of the roof to remove a ball from the gutter, and was resting on his left hand. Suddenly his hand slipped, and he immediately became unconscious. Held, sufficient to show the injuries resulted from contact with the wires.

In *Boyd v. Portland General Elec. Co.*, 37 Ore. 567, 62 Pac. 378, 52 L. R. A. 509, an eleven year old boy was found lying on the ground immediately under a broken electric wire, in an insensible condition and badly burned. No one witnessed it, and the boy was unable to give any account of how it occurred. There was a broken wire crossing over other wires, and hanging down in two loops, one of which swung near the ground. The case was reversed for error in the instructions defining "reasonable care." No question was raised but that the evidence was sufficient to show the injuries resulted from contact with the wire. Other cases might be cited, but the above are sufficient for our purpose. We are, therefore, of the opinion that no error was committed in refusing the instruction requested by the city, nor in refusing a new trial upon the ground of insufficiency of the evidence.

Another point suggested by the appellant is error in the admission of testimony of the finding of another dead man two doors south, a few minutes before, under circumstances indicating death resulted from electric shock. We think such testimony was admissible under the issues. It had a tendency to prove that the secondary circuit was in a condition dangerous to human life (it being admitted both premises were on the same secondary circuit). This was a pertinent and material fact to be shown by respondents in seeking to establish the negligence of the city, and for such a purpose it was clearly competent. Appellant says such evidence was highly prejudicial and inflamed the minds of the jury. If the evidence was competent, we cannot go further and appreciate its effect upon the minds of the jury. Competency is not to be determined by such a test or effect. A like question was

passed upon in *Gilbert v. Duluth General Elec. Co.*, 93 Minn. 99, 100 N. W. 653, 106 Am. St. 430, where evidence of another person receiving a shock in the basement of the same house, and some hours after the accident there complained of, was held competent as tending to show the dangerous condition at the time of the prior accident.

The only remaining question is that the verdict was excessive. The verdict as returned was for $27,000. This was reduced by the trial judge to $18,000, and such reduction accepted by respondents. The appellant contends it is still excessive, and with this contention we agree. The deceased was thirty-nine years of age at the time of his death, and was earning a salary of $75 a month. In the case of *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518, cited and relied upon by appellant, the deceased was twenty-five years of age, a good business manager, and earning $150 a month. The court held that, under such circumstances, a verdict of $40,000 was excessive, and the same was reduced to $25,000. In *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081, the deceased was thirty years of age, earning $50 a month in addition to performing other duties. A verdict of $15,000 was held not excessive. Upon the principle and reasoning of these cases, and having fully in mind the weight that should be given to verdicts in cases of this character, we think $18,000 is still excessive, and that there should be a further reduction to the sum of $12,000.

The cause is remanded, and the respondents may have thirty days after the remittitur is filed in the court below to consent in writing to a judgment in the sum of $12,000, which said judgment, upon such consent, the court below is hereby directed to enter. If such consent be not so filed and such reduction not accepted, the court below is instructed to order a new trial. Appellant will recover costs in this court.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

[No. 8235. Department One. January 26, 1910.]

# FRANK J. KING *et al.*, *Respondents*, v. HERBERT S. UPPER, *Appellant*.[1]

SPECIFIC PERFORMANCE—REAL ESTATE—ORAL SALE—FRAUDS, STATUTE OF. Specific performance for the sale of standing timber cannot be decreed upon a written agreement placed in a bank with directions to deliver it to the plaintiff upon payment of the price, within a specified time, and to return it to the defendant after expiration of the time, where the payment was not made and the writing was returned, and the contract for the sale of the timber was oral, and the plaintiff's evidence denied the escrow and had the effect to show that there was no escrow outside of the oral contract of sale.

APPEAL—REHEARINGS—NEW QUESTIONS. A rehearing will not be granted to consider a new question not involved on the original hearing or even referred to in the briefs on appeal.

Appeal from a judgment of the superior court for King county, Hardin, J., entered April 15, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for specific performance. Reversed.

*Shank & Smith*, for appellant.

*Peters & Powell* and *Marion Edwards*, for respondents.

RUDKIN, C. J.—Some few days prior to the 20th day of March, 1908, the plaintiff Frank J. King entered into negotiations with the defendant, Upper, for the purchase of certain growing timber in King county. It was finally agreed between the parties that, in consideration of the sum of $200, the plaintiffs should have an option to purchase the timber for the sum of $6,000, for the period of thirty days. On the above date, the terms of the contract for the sale of the timber were agreed upon, and the parties met at the office of the defendant, Upper, for the purpose of closing the deal. After the contract of sale had been exe-

[1]Reported in 106 Pac. 612, 1135.

cuted and acknowledged, Upper dictated the following to his stenographer, which was afterward transcribed on the envelope in which the timber contract was enclosed:

"National Bank of Commerce, City.

"Gentlemen: Please deliver the enclosed to Frank J. King on or before April 15th, upon the receipt of $5,800. Upon the receipt of the above amount place the same to my credit," and signed the same.

The parties thereupon repaired to the bank, and the papers were delivered to the assistant cashier, who noted the following on the envelope containing the timber contract, in the presence of the parties, "by 3:00 p. m. Apr. 15, 1908, to be returned to Upper;" and at the request of the bank the plaintiff Frank J. King signed his name on the corner of the envelope for identification. The $5,800 was not paid on or before April 15th at 3 p. m. and the papers were returned to the defendant at the expiration of that period. The present action followed to specifically enforce the contract of sale or escrow agreement, and from a judgment in favor of the plaintiffs, the present appeal is prosecuted.

In the consideration of this appeal we must not lose sight of the fact that two contracts are involved; first, the oral contract of sale, and second, the escrow agreement. Under all the authorities the former will not support an action for specific performance, because the contract was not reduced to writing, and there was no part performance to take the case out of the statute of frauds. If therefore, we view this as an action to enforce specific performance of the oral contract of sale, the action must fail, and if we view it as an action to enforce specific performance of the escrow agreement, the same result must follow, for we find in the record no proof of any such agreement.

The respondent Frank J. King testified that he had no knowledge of the contents of the agreement endorsed on the envelope containing the contract of sale until after the 15th day of April, 1908, and that he did not consent to any such

agreement. The court below found with the respondents on this point, but if we accept that finding as correct it will not aid them, for if they have succeeded in showing that this was not the escrow agreement, they have equally succeeded in showing that there was no escrow agreement at all.

If the respondents did not consent to and are not bound by the agreement endorsed on the envelope, it is very apparent that the appellant did not consent to and should not be bound by any other agreement. The effect of the respondents' testimony is to prove that there was no escrow agreement, independent of the oral contract of sale. In other words, their sole contention is that they did not enter into a particular contract; they do not claim that they entered into any other or different contract, but simply assumed that the escrow agreement fixed the same time for performance as the oral contract of sale. That is, they attempt to prove an escrow agreement by proving the terms of an oral contract for the sale of an interest in land. If we eliminate from this case all reference to the oral contract of sale—and we think we must—there is not even the semblance of an escrow agreement left. The appellant simply deposited his contract with the bank, with the explicit direction that it should be returned to him if not taken up by a certain date. The contract was not taken up within the time limited, and was properly and rightfully returned to the appellant at the expiration of that period. It seems to us that, under these admitted facts, there is nothing left for the respondents except to fall back on their nonenforceable oral agreement. In thus disposing of this case we have assumed that it was competent to prove the terms of the escrow agreement, as contradistinguished from the contract of sale, by oral testimony, but upon that question the authorities are in conflict. *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162; *Manning v. Foster*, 49 Wash. 541, 96 Pac. 233, 126 Am. St. 876, 18 L. R. A. (N. S.) 637.

In the former case it was held that the condition upon which a deed is deposited in escrow may be proved by parol, *where*

*there is a previous valid contract to convey.* The qualification, that there must be a previous valid contract to convey, was ignored or overlooked by this court in the later case of *Manning v. Foster, supra.* We deem it unnecessary at this time to attempt to reconcile these cases, further than to say that the several opinions in *Campbell v. Thomas,* 42 Wis. 437, 24 Am. Rep. 427, upon which the former case was based, are entitled to grave consideration in considering the question here involved. For the foregoing reasons, the judgment is reversed, with directions to dismiss the action.

CHADWICK, GOSE, and MORRIS, JJ., concur.

ON PETITION FOR REHEARING.

[Decided April 1, 1910.]

PER CURIAM.—In a petition for a rehearing filed in this cause the respondents insist that they are at least entitled to recover the $200 paid on the option or contract of sale. This question was not involved on the original hearing, and was not so much as referred to in the briefs. We are therefore asked to grant a rehearing for the purpose of litigating a new question. We are unwilling to adopt such a practice, but the dismissal will be without prejudice to a new action for recovery of that amount. To this extent the original opinion is modified, but in all other respects the rehearing is denied.

[No. 8238. Department One. January 26, 1910.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. RAILROAD COMMISSION OF WASHINGTON, *Respondent*.[1]

CARRIERS—SWITCHING CHARGES—RATES—PRESUMPTIONS—APPEAL—REVIEW. An order of the railroad commission reducing switch charges, based largely upon an old rate that had been continued in force for some time, and upon conflicting evidence as to the time consumed in the service and as to the other services performed by the switching crew, is aided by the presumption that a rate continued in force for some time is presumed to be remunerative and by the presumption that the findings of the commission are correct; and the order will not be disturbed on appeal although the testimony is meager, indefinite, and unsatisfactory.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 18, 1909, affirming an order of the state railroad commission fixing a rate for switching cars containing mill products, after a hearing before the court. Affirmed.

*B. S. Grosscup* and *Geo. T. Reid*, for appellant.

*The Attorney General* and *W. V. Tanner, Assistant*, for respondent.

PER CURIAM.—This is an appeal from a judgment of the superior court of Pierce county, affirming an order of the railroad commission fixing the rate for switching cars containing slabs and mill wood from the plant of the St. Paul & Tacoma Lumber Company to the plant of the Carstens Packing Company, in the city of Tacoma, the distance between the two plants being about 1,500 yards. The commission found that a rate of $2.25 per car for a minimum car load of twelve cords, with an additional charge of 18¾ cents per cord for each cord in excess of the minimum, was reasonable and remunerative, and entered an order abrogating and discontinuing the published tariff rate of the company,

[1]Reported in 106 Pac. 611.

which fixed the charge for the same service at $3.75 per car for a minimum car load of twelve cords, with an additional charge of 31¼ cents per cord for each cord above the minimum. The appeal was prosecuted to the superior court on the ground that the rate established by the commission was unreasonable and unremunerative, and the same question is presented here.

It appears from the testimony that for a number of years the railroad company performed the same service for $1.50 per car, using old dismantled stock cars with a capacity of about eight cords; that for a period of about six months thereafter this rate was increased to $2.50 per car, and again reduced to the old rate of $1.50 per car. The findings of the commission were based largely, if not entirely, upon this old rate. The testimony in the case is indefinite and unsatisfactory, rather than conflicting. It would be possible from the evidence to ascertain the cost of maintaining the switching crew, with a reasonable degree of certainty, but the duties of the crew are so varied and multifarious that no estimate of its earning capacity can be arrived at. It appears that the crew handled a certain number of cars per day for a given period, but it also performed other services between times, of which no account was taken. There is some testimony or statements in the record tending to show that it took the switching crew about one hour each day to perform this service, and that two cars were devoted to this purpose at all times. If it satisfactorily appeared that it took one-tenth of the time of the switching crew and the constant use of two cars to perform the service, we are of the opinion that the rate fixed by the commission was not reasonable or remunerative; for we think it satisfactorily appears from the record that the cost to the company of maintaining the switching crew exceeds that. But there is a dispute as to the length of time consumed, and it is also claimed that other services were performed by the crew during the same period. A rate which has been continued in force for a considerable period of time

is presumed to be reasonable and remunerative, and the findings of the commission are presumed to be correct. If we were convinced that the rate was too low we would not hesitate to so declare, but when the record is aided by the above presumptions, we do not think that we would be warranted in disturbing the order of the commission, although the testimony upon which the order is based is meager, indefinite, and unsatisfactory. The judgment is therefore affirmed.

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[No. 8291. Department Two. January 27, 1910.]

MADRONA GROCERY COMPANY, *Respondent*, v. OSCAR E. WALLIN *et al.*, *Appellants*.[1]

TRIAL—MISCONDUCT OF ATTORNEY—QUESTIONS TO SHOW INDEMNITY OF PARTY. In an action against a constable for the wrongful seizure of property under execution, it is not misconduct of the plaintiff's counsel, or prejudice warranting a new trial, that he asked the constable "why he did not obtain an indemnity bond" when he found that the plaintiff claimed the property, and "you did not obtain any security prior to your levy, did you," objections to which were sustained; as the questions did not intimate that the party was indemnified, but rather the contrary, and no prejudice was shown.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 15, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for wrongful seizure of personal property under an execution. Affirmed.

*Murphine & Collins*, for appellants.

*Herchmer Johnston*, for respondent.

CROW, J.—This action was commenced in the superior court of King county by the Madrona Grocery Company, a corporation, against Oscar E. Wallin, constable of Kirkland precinct, and his official bondsmen, to recover damages for an

[1]Reported in 106 Pac. 617.

unlawful and wrongful seizure of personal property belonging to the plaintiff. From a judgment in favor of plaintiff, the defendants have appealed.

Appellants' only contention is that respondent's attorney was guilty of misconduct sufficient to warrant a reversal and the granting of a new trial. The record discloses, that Wallin as constable, acting under an execution issued against A. F. Flannigan and Fred Flannigan, seized and sold certain personal property claimed by the respondent, and the only issue tried was whether the personalty so seized was its property or that of the judgment debtors named in the execution. The alleged misconduct occurred on the cross-examination of the appellant Wallin, as follows:

"Q. When you went up there with that execution, Mr. Wallin, and Mr. Farr told you that that property belonged to the Madrona Grocery Company, what did you say to him? A. Why, they said the same thing as all of them do, and I have served, I guess, some three hundred executions. They claim another party owned the goods. Q. Well, when Mr. Flannigan told you it was not his property, what did you do? A. Well, they all say the same thing. Q. What did you say to him then? A. I asked them if they would sign an affidavit to that effect. They refused to do so. Q. Why didn't you ask for an indemnity bond when you had notice that this property—that there was a question about the title of it? A. I did. Mr. Casey (attorney for appellants): Just a minute, Mr. Wallin. I think that is entirely immaterial. The Court: Do you object? Mr. Casey: Certainly. The Court: Objection sustained. Q. You did not obtain any security prior to your levy, did you? Mr. Casey: Same objection. The Court: Objection sustained."

Counsel for respondent proceeded with the cross-examination on other matters, after which the record shows the following:

"Mr. Casey (attorney for appellants): Now, if the court please, at this time I want to enter an objection as to the conduct of counsel in trying to show that this witness, who is the defendant in the action, was indemnified by bonding by a surety company. The Court: Well, there is nothing of that

kind here that I know of. Mr. Johnston (attorney for respondent): No, I never said anything of the sort. Mr. Casey: He asked a few minutes ago why he did not require an indemnity bond and if he had an indemnity bond and I objected to that as improper. The Court: The objection was sustained and the court did then, or, if not, it will now instruct the jury to disregard it. Mr. Casey: I wish to take an exception to those statements, of the conduct of counsel. The Court: Exception allowed."

Appellants now insist that respondent's counsel, by his cross-examination, improperly attempted to show in the presence of the jury that the appellant had taken an indemnity bond; that by reason thereof some third person would have to pay any judgment that might be rendered against him, and that by reason of such misconduct the appellants are entitled to a new trial. In support of this contention, they cite numerous authorities, including the following cases from this court: *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Lowsit v. Seattle Lumber Co.*, 38 Wash. 290, 80 Pac. 431; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Westby v. Washington Brick, Lime & Mfg. Co.*, 40 Wash. 289, 82 Pac. 271.

On the record we think that no prejudice has been shown, and that appellants' contention is without merit. The theory on which this court decided the several cases cited was that counsel for the plaintiffs in personal injury cases improperly attempted to show that the defendants therein had casualty or indemnity insurance; that they would not be compelled to satisfy any judgments that might be rendered against them, and that such attempts, although made under other pretenses, were in reality for the improper purpose of creating prejudice in the minds of the jury. In each case the conduct and surrounding circumstances were such as to give the jury a direct intimation that the defendant had actually obtained such indemnity insurance, and was thereby protected from loss. In *Iverson v. McDonnell, supra*, this court said:

"It is true, the respondent said, when the objection was made that the question was asked for the purpose of affecting

the credibility of the witness; that he wished to know what his interests were in the case. But it seems to us it plainly appears that the purpose of the question was to get before the jury, not testimony affecting the credibility of the witness, but testimony showing that the judgment would be paid by the insurance company instead of by the appellant. There was no question about the interest of the witness McDonnell. He was the defendant in the case, had testified that he was, and that he was the owner of the mill and the employer of the plaintiff in the case. And the testimony sought to be elicited by the counsel for respondent, instead of affecting his credibility by showing the responsibility of the insurance company for the judgment, would tend to strengthen the testimony of the witness by showing that he had no interest in the result of the case. Hence, it is not likely that the attorney for the respondent asked these questions for the purpose of strengthening the testimony of the appellant in the case."

There is nothing in the record to show that appellant actually obtained an indemnity bond, nor was it suggested or intimated that he had done so, by any of the questions propounded by respondent's attorney. In fact, if the questions contained any suggestion on the subject, it was that the constable had failed to insist upon his legal right to an indemnity bond before proceeding with the levy. Rem. & Bal. Code, § 4003, relieves a sheriff, deputy sheriff, or coroner from liability for neglecting to serve any civil process, unless an indemnity bond be first tendered him if required. Rem. & Bal. Code, § 1888, provides that, when property levied upon is claimed by a third party, the sheriff or constable shall be entitled to demand a bond, and it is the ordinary rule that such officers may, before making a levy, demand an indemnity bond when they are in doubt as to the ownership of the property, or when it is claimed by a stranger to the execution. 25 Am. & Eng. Ency. Law (2d ed.), 685; *Howard W. Middleton Co. v. Souder*, 74 N. J. L. 87, 64 Atl. 975.

There was nothing in the form of either of the questions asked by respondent's counsel calculated to inform the jury that the constable had obtained an indemnity bond. If any

prejudice did arise, it would seem to have been caused by the language employed by appellants' attorney when he interposed his last objection, which was itself more prejudicial than either of the questions to which appellants objected. While we adhere to the rule announced in the cases cited, we do not think it can be applied to the facts now before us.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

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[No. 8132. Department Two. January 28, 1910.]

PETER MULLER, *Respondent*, v. APEX FISH COMPANY, *Appellant*.[1]

FISH—LICENSES—EXPIRATION—LOCATION. Where a license for a fish trap expires before any trap has been actually constructed, the place becomes open water subject to the first proper location for the next season.

SAME—LOCATION—PLAT — DESCRIPTION — SUFFICIENCY. A clerical error in giving a fish trap location at a specified section corner in township 37, instead of township 33, will not invalidate a location, where the plat sufficiently identified the site by locating it off the west coast of Whidby Island, since no one could be misled.

SAME—LICENSES—PREREQUISITE—FEDERAL PERMIT. A Federal permit is not a prerequisite to the issuance of a state license for a fish trap, and failure to secure the same cannot be urged as an excuse for trespass on the location, it being a matter between the locator and the Federal authorities.

Appeal from a judgment of the superior court for Island county, Still, J., entered May 17, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to establish the right to a fish trap location. Reversed.

*Hadley, Hadley & Abbott* and *Million & Houser* (*Dorr & Hadley*, of counsel), for appellant.

*Byers & Byers*, for respondent.

[1]Reported in 106 Pac. 625.

MOUNT, J.—This action is a contest over a fish trap location in the waters of Puget Sound off the west coast of Whidby Island. The plaintiff alleged, that on January 9, 1909, he located a fish trap or pound net location at a point opposite section 29, tp. 33, north, range 1, east, W. M., and caused said location to be accurately surveyed and a plat thereof to be filed with the county auditor of Island county; that at said time he was the holder of fishing license No. 14, issued by the state fish commissioner, which license was good until March 31, 1909; that the waters wherein said location was made were open waters and were subject to the location made by the plaintiff; that afterwards, on April 8, 1909, in order to more fully comply with the law, plaintiff made another location under a renewal of license No. 14; that the defendant afterwards occupied and trespassed upon, and was attempting to construct upon the plaintiff's location, and without right claimed an interest in such location, and excluded the plaintiff therefrom. The prayer was for a restraining order restraining the defendant from interfering with the plaintiff in said location. The defendant answered, denying that the plaintiff was a prior locator, and alleged that it was prior both in time and right. The priority of location was the principal issue in the case. Upon the trial the court found that the waters where the location was made were open waters and subject to the location as made by the plaintiff on January 9, 1909, and that the plat of location made and filed by the defendant on April 1, 1909, did not mark the limits of the trap and did not describe the location sufficiently for identification, and therefore entered a decree as prayed for in the complaint.

It was very clearly shown that the defendant had located these waters as a trap site each year since the year 1905, and that defendant's location and license for the year 1908-9 had not expired when the plaintiff made his location on January 9, 1909. It is true that the defendant had not constructed a trap on the location but had leased the same to another

during these years. It is conceded that the license under which the plaintiff sought to make his location on January 9, 1909, had been used upon another location which the plaintiff had fished, and that neither party had constructed a trap on the location in question during the season ending April 1, 1909. On the last-named date, on the expiration of all the licenses issued for the fishing season ending on that date, the defendant made a new location on the site in question, and began the active work of constructing a trap. Thereafter on April 8, 1909, the plaintiff procured a new license and made another location upon the same, or substantially the same, waters. These facts were not disputed. It may be conceded for the purpose of this case, therefore, that the location in dispute was open water on April 1, 1909, and subject to location by any person, because the licenses had expired and because no trap had been actually constructed by either party during the fishing season. *Womer v. O'Brien*, 37 Wash. 9, 79 Pac. 474. The appellant was first in time in filing its location for the year 1909, and, if its plat was a proper one, is no doubt prior in right.

It appears that upon the plat filed by the appellant on April 1, 1909, the section corner from which the trap site is located was described as being at "sections 28, 29, 32, and 33, T. 37, N. R. 1 E.," instead of township 33, north, range 1, east, and the court found that this plat was not sufficient for identification of the trap site. But the evidence very clearly points out that this was a clerical error, and that no one would or could be misled thereby, because the plat located the trap site off the west coast of Whidby Island, opposite section 29, which is in township 33, north, range 1, east, and that there could be no such place upon that coast as township 37 north, range 1, east. It was not claimed that the respondent was misled by this error. The map or plat upon its face seems, both by the evidence and an examination of the plat itself, amply sufficient for the ascertainment and identification of the trap site on the premises, which is all the

statute requires. Laws 1905, p. 255, § 2 (Rem. & Bal. Code, § 5214).

The respondent claims that the appellant had no Federal permit to construct its trap in these waters. There is some question whether the appellant had such permit, but if it did not, that fact would not authorize the respondent to appropriate the location. Whether the appellant had such permit is a matter wholly between the appellant and the Federal authorities. It is not made by statute a prerequisite to a valid location.

We are of the opinion for these reasons that the appellant was prior in right and that the trial court should have dismissed the action. The judgment appealed from is therefore reversed and the action dismissed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

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[No. 8364. Department Two. January 28, 1910.]

## W. J. WILSON, *Appellant*, v. B. W. JAMES *et al.*, *Respondents*.[1]

BROKERS—CONTRACTS—COMPENSATION—CONSTRUCTION. A broker's contract to secure options on timber on certain lands for a commission of twenty per cent of the net profits derived from the sale of the timber, does not entitle him to commission on the profits of land which it was necessary to purchase in order to secure part of the timber; the contract contemplating only the purchase of timber to be removed from the land within a time specified.

Appeal from a judgment of the superior court for King county, Hardin, J., entered April 12, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

*Caldwell & Riddell*, for appellant.

*H. R. Clise* and *C. K. Poe*, for respondents.

[1]Reported in 106 Pac. 618.

MOUNT, J.—This case turns upon the construction of a contract entered into by the appellant with the respondents. The contract provides as follows:

"That whereas the party of the first part [the appellant] is to procure for the parties of the second part [respondents] options or agreements whereby the parties of the second part may become the purchasers of certain timber located on lands hereinafter referred to. Now, therefore, it is understood and agreed that the party of the first part will use his reasonable efforts to procure for the benefit of the parties of the second part agreements, contracts or options for the purchase of twenty to thirty million feet of merchantable timber located on section three (3) and ten (10) in township twenty-four north (24) of range one (1) east, at an aggregate price not to exceed six thousand dollars ($6,000). It is understood and agreed that such contracts, agreements or options as shall be procured shall stipulate at least for a period of five years in which to remove the timber from the land on which it is situated. Now it is agreed that if, through the endeavors of the party of the first part, the parties of the second part shall purchase such timber or other timber in said vicinity, then the party of the first part shall have as his compensation or commission for promoting said purchases, twenty per cent (20%) of the net profits which shall be derived from the sale or disposition of said timber, it being understood that the parties of the second part shall, for such of said timber as they elect to purchase, furnish the cash and take the title and become the owners of said timber. It is furthermore agreed that the parties of the second part will not sell or dispose of said timber as may be so purchased, prior to a year from this date without the consent or acquiescence of the party of the first part."

It appears that, in order to purchase the timber, it was necessary to purchase certain land, and the land and timber were purchased. The appellant contends that he is entitled under the contract to twenty per cent of the net profits derived from the land as well as the timber. The trial court was of the opinion that the appellant was entitled only to the net profits derived from the sale of the timber, and entered a judgment therefor. It is apparent from the contract that

the appellant was employed to purchase timber. He was not employed to purchase land. When he purchased the land he did so merely in order to acquire the timber. The contract is specific in fixing the amount of commission, and also in fixing the source from which the commission was to be derived, viz: "twenty per cent of the net profits which shall be derived from the sale or disposition of said timber."

If the parties had intended that the appellant should receive twenty per cent of the net profits of the purchase, the sentence, "which shall be derived from the sale or disposition of said timber" is entirely superfluous and meaningless. The parties themselves agreed upon the source from which the commission was to be procured as well as upon the amount of it, and limited the source to the net profits from the sale of the timber. The contract to purchase timber did not necessarily include the purchase of land. It shows upon its face that the timber was to be purchased independently of the land, because it is stated that the contracts procured "shall stipulate for a period of five years in which to remove the timber from the land on which it is situated." It is clear, therefore, that the parties when using the word "timber" in the contract did not intend to include land, and did not intend that the commission should be derived from the net profits derived from the sale of the timber and the land on which it stood. Taking the plain words of the contract in their ordinary acceptation, the appellant's commission was clearly limited to the net profits derived from the sale of the timber, and reading the whole contract, it is apparent that the word "timber" as used therein does not include the land upon which the timber stood. The lower court was therefore right in limiting the commission to the net profits derived from the sale of the timber only.

With this view of the contract, it is not necessary to consider other questions presented. The judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and CROW, JJ., concur.

[No. 8458. Department Two. January 28, 1910.]

DOUGLAS C. CONOVER, *Respondent*, v. MARY CARPENTER *et al.*, *Appellants*.[1]

ATTORNEY AND CLIENT — FEES — OFFSET—NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for attorney's services rendered to an estate, the defendant cannot offset the negligence of the plaintiff resulting in defendant's payment of an improper inheritance tax, where it appears from an inventory verified by the defendant that the tax was a proper charge against the estate, and there was no evidence to the contrary except plaintiff's opinion, given to the defendant, that it was not a proper charge.

TRIAL—INSTRUCTIONS—COMMENT ON FACTS. An instruction stating facts that are not disputed is not prejudicial as a comment on the evidence.

Appeal from a judgment of the superior court for King county, Gay, J., entered June 19, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

*Elias A. Wright*, for appellants.

*Horace A. Wilson*, for respondent.

MOUNT, J.—The plaintiff brought this action to recover the alleged value of services rendered as an attorney at law for the defendant, at her special instance and request. The cause was tried to a court and a jury. A verdict was returned in favor of the plaintiff, and from the judgment rendered thereon, the defendant has appealed.

It is argued that the court erred in withdrawing from the consideration of the jury an item of $22.01, alleged as an offset to the amount prayed for in the complaint. It is alleged that this item was paid by the appellant to the state, as an inheritance tax upon an estate, through the carelessness of the respondent, and that the item was not a proper

[1]Reported in 106 Pac. 620.

charge against the estate. There is no evidence in the record, except the opinion of the respondent expressed to the appellant prior to the payment, that the item was not a proper charge against the estate. It was paid by the appellant after she had discharged the respondent, and upon the inventory verified by the appellant. The court was, therefore, clearly justified in withdrawing from the jury the consideration of the item, even if it was not a proper charge against the estate. Upon the face of the inventory verified by the appellant, the charge was a proper one.

It is also argued that the court erred in giving to the jury the following instruction:

"You will take the files in the probate case bearing Mr. Conover's signature. Do not get them mixed as you take them out. Put them back together. These files that are in there bear Mr. Conover's signature, and they are supposed to represent some of the work he did."

It is argued that the last sentence of this instruction was a comment by the court upon the facts. The facts there stated were not disputed facts. They were admitted, and therefore the statement could not be prejudicial.

No other errors are assigned. We find no merit in the appeal, and the judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and CROW, JJ., concur.

[No. 8486. Department Two. January 28, 1910.]

MODERN PLUMBING & HEATING COMPANY, *Appellant*, v. AMERICAN SODA FOUNTAIN COMPANY, *Respondent*.[1]

MECHANICS' LIENS—PERSONS ENTITLED—MACHINISTS—STATUTES—CONSTRUCTION. A plumber doing work upon a soda water fountain is not entitled to a lien under the provisions of Laws 1905, p. 137, § 1, giving a lien to blacksmiths, wagon makers, machinists, and boiler makers, expending labor on any chattel; as "machinist" does not include a plumber.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 26, 1909, dismissing at the close of plaintiff's case, an action to foreclose a mechanics' lien, after a hearing before the court. Affirmed.

*Arthur C. Dresbach* (*F. A. Gilman*, of counsel), for appellant.

*McBurney & Cummings*, for respondent.

MOUNT, J.—The plaintiff brought this action to foreclose a lien filed under the provisions of chapter 72, Laws of 1905, page 137, for labor and material furnished in connecting a soda fountain, gas drum, and generator with the city water supply in the city of Seattle. At the close of the plaintiff's evidence, the trial court was of the opinion that the work done was not that of a machinist within the provisions of the statute referred to, and therefore denied the lien and dismissed the action. Plaintiff appeals.

The statute provides:

"Every blacksmith, wagon maker, machinist, or boiler maker who has expended labor, skill, or material on any chattel . . . shall have a lien upon such chattel," etc.

The evidence shows, that plaintiff was engaged in the plumbing business; that it furnished the materials for, and one of its employees connected, the soda fountain, gas drum,

[1]Reported in 106 Pac. 628.

and generator, together and with the city water works, and also packed some of the joints and cocks or valves of the soda fountain. The whole work was done by an experienced plumber engaged in the plumbing business, and appears to have been work directly in line with a plumber's work. There is no evidence that a machinist was employed to do the work, or that the work was necessarily that of a machinist. The statute applies to four classes of persons, viz., blacksmiths, wagon makers, machinists and boiler makers. It applies to no others.

It is claimed that the appellant is entitled to a lien because the work was done upon a machine. But the statute is not so broad as that. It provides that a machinist who has expended labor on any chattel shall have a lien thereon, and clearly intends to provide only for the classes named. To hold otherwise would be to say that the statute means that *every person* who performs labor upon a chattel shall have a lien thereon. Of course, the statute neither says nor means anything of that kind. It means only that the classes named shall have liens for skilled labor performed on chattels. It does not mean that a painter may have a lien for painting an engine, or that a carpenter may have a lien for carpenter work done thereon, or that a plumber may have a lien for plumbing done on a machine. Blacksmiths, wagon makers, machinists, and boiler makers are distinct classes, well recognized, and do not include plumbers, painters, plasterers and such like artisans. Appellant was therefore not entitled to a lien under the law, simply because it worked upon a machine.

The judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and CROW, JJ., concur.

[No. 8544. Department Two. January 28, 1910.]

J. J. LUNDELL *et al.*, *Respondents*, v. ALLEN & NELSON MILL COMPANY, *Appellant*.[1]

BOUNDARIES—DESCRIPTIONS—CALLS—COURSES AND DISTANCES. In a description in a deed in which a calculation of the north measurement of an irregular meander showed a total width of 1080 feet, while the south measurement called for a distance of 1020 feet, to the place of beginning, the end measurements control a call for parallel lines on the east and west sides of the tract, and such lines cannot be parallel (RUDKIN, C. J., and PARKER, J., dissenting).

EJECTMENT—EVIDENCE—BURDEN OF PROOF—SUFFICIENCY. In ejectment, the burden is upon the plaintiff to establish his title; and he fails to do so, as regards a disputed boundary line, where it appears that the line is not located on the ground, and it is reasonably certain defendant is not occupying any of plaintiff's land, plaintiff's main contention being for a sixty-foot overlapping strip, under a deed subsequent to defendant's deed.

Appeal from a judgment of the superior court for King county, Yakey, J., entered May 25, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action of ejectment. Reversed.

*Edwin H. Flueck*, for appellant.

*Smith & Cole*, for respondents.

MOUNT, J.—This action was brought by the plaintiffs to eject the defendant from the occupation of a certain strip of land, the title of which was alleged to be in the plaintiffs. The answer of the defendant was a denial of the allegations of the complaint and an allegation of adverse possession. The cause was tried to the court without a jury. Findings and a judgment of ouster were entered in favor of the plaintiffs. The defendant has appealed from that judgment.

It appears that the respondents and one W. J. Lewis own adjoining tracts of land on the south side of Lake Sam-

[1]Reported in 106 Pac. 626.

mamish, in King county. The land belonging to respondents lies to the west of the land owned by Mr. Lewis. The land owned by each of these parties was acquired from a common source. Mr. Lewis leased to the appellant a strip forty feet in width along the west side of his tract, to be used for a logging railroad. The railroad was constructed, and respondents now claim that the railroad is located upon their land and not upon the land of Mr. Lewis. The sole question in the case is the location of the boundary line between the two tracts of land. Mr. Lewis acquired his title in October, 1902, the description in the deed reading as follows:

"Commencing at the quarter corner between sections 18 and 19, township 24, north, range 6 East, W. M., running thence north along the northerly and southerly center line of said section 183,908 feet to the low water line of Lake Sammamish; thence along the said water line of said Lake Sammamish north 67¼ degrees west 265 feet; thence north 25½ degrees west 268 feet; thence north 50 degrees west 192 feet; thence north 43 degrees west 271 feet; thence north 86 degrees west 47 feet; thence south 29 degrees west 515 feet; thence south 51¾ degrees west 113 feet; then leaving the lake shore and parallel with said northerly and southerly center line of said section 184,013 feet to the southerly boundary line of said section 18; thence easterly along the said southerly boundary line of said section 18 1,020 feet to the place of beginning, containing 100 acres more or less."

Respondents acquired their tract in May, 1905, and the description in their deed reads as follows:

"Beginning at the southwest corner of lot 1, section 18, township 24 north, range 6 east; thence east along the south line of said lot and said line projected about 1,620 feet more or less to a point 1,020 feet west of the center line of said section 18; thence north parallel to the north and south center line of said section 1,325 feet to the shore of Lake Sammamish; thence northwesterly along the shore of said lake 1,882 feet more or less to the northwest corner of said fractional section 18; thence south along the west line of said section 1,975 feet to the point of beginning, excepting a ten-acre tract 660 feet by 660 feet in the southwest corner

of said lot 1 heretofore sold to Chris Hanson by A. D. and T. McMahon, containing 52 acres."

It will be noticed that the boundary line running north and south in the description is said to be "parallel with said northerly and southerly center lines of said section." It will also be noticed that Mr. Lewis acquired his tract of land some two years prior to the time the respondents acquired the adjoining tract on the west. It is not disputed in the case that the distance across the north boundary of Mr. Lewis' tract on a right line, between the boundary on the east and the boundary on the west, is 1,080 feet as shown by the angles and distances contained in the description thereof, and it is not disputed that the distance across the south boundary or center of the section is 1,020 feet. It is apparent, therefore, that the lines on the east and west sides of the tract in dispute cannot be parallel with the center line between the two tracts, because there is a difference of sixty feet between the width of the tract on the north and the width on the south. The center line dividing the two tracts is not, and cannot be, parallel with the line on the east. The end measurements must control and must locate the dividing line which was established by such measurements. The deed running to the appellant was a prior deed, and of course controls the subsequent deed to the respondents where there is any conflict. It is apparent, however, that the later description was made with reference to the former and was not intended to overlap the former description.

There is some dispute as to the exact location of the stakes marking the dividing line upon the ground. But it is reasonably certain that, if the width of Mr. Lewis' tract of land is 1,080 feet on the north, then no part of appellant's railroad is located upon respondents' land, respondents' main contention being that the width of the Lewis tract was only 1,020 feet. It is a settled rule that, where a party seeks to acquire possession of land by ejectment, the burden is upon

him to establish his legal title to such land. *Suksdorf v. Humphrey*, 36 Wash. 1, 77 Pac. 1071.

We think there can be no doubt in this case that the respondents' evidence fails to establish title to the land occupied by the railroad, because it fails to show where the dividing line is located upon the ground, as required by the senior deed. The trial court was impressed with the fact that this line had not been located, because in rendering the decision he said, "These people ought to have these lines established." The court was of the opinion, however, that a determination of the location of the dividing line was not essential to the case. The exact location of that line was probably not essential, provided the tract of land owned by Mr. Lewis was of uniform width of 1,020 feet, but since the width thereof is 1,080 feet at the north, it is apparent that the respondents are attempting to claim about sixty feet more than they actually own, and it was therefore essential to establish the line so as to show that appellant was occupying respondents' land.

The judgment must therefore be reversed and the cause dismissed.

CROW and DUNBAR, JJ., concur.

PARKER, J. (concurring)—I concur in the result, but think the western boundary of the Lewis tract is parallel with and 1,080 feet west of the center line of the section, and that the 1,020 feet of the last call in the deed is controlled by the course of the west boundary, since that distance purported to run to a fixed point. I do not think the evidence shows any attempt by the parties to the deed to fix the southwest corner upon the ground; hence it is determinable by the language of the description alone.

RUDKIN, C. J., concurs with PARKER, J.

[No. 8354. Department One. January 28, 1910.]

OTTO KEMPE, *Appellant*, v. C. T. JOHNSON, *Respondent*.[1]

SALES—FACTORS—CONTRACT — EVIDENCE — SUFFICIENCY. The evidence shows a sale, and is insufficient to warrant a finding of a consignment to a broker for sale on commissions, where it appears that the defendant bargained for potatoes from various owners at a specified price, intermingled the different consignments, kept no books as required of commission merchants by statute, and all the consignors testified to absolute sales.

SET-OFF AND COUNTERCLAIM—SEVERAL CAUSES ASSIGNED—SALES——INTERMINGLING OF PRODUCE. Where potatoes are sold by various parties and intermingled by the defendant, and all claims for the price were assigned to one person, who sued therefor, the defendant is entitled to a deduction for part returned as unmarketable, although he would have been unable to secure an offset against any individual claim.

TENDER—DEPOSIT IN COURT—ACCEPTANCE—EFFECT. The acceptance of a deposit, unconditionally paid into court by defendant to be credited upon the account, does not operate as a settlement or end the controversy as to the balance claimed.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered May 29, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

*Belt & Powell*, for appellant.

*Scott & Campbell*, for respondent.

PER CURIAM.—In the spring months of 1908 certain farmers residing in Spokane county, Washington, severally owning a quantity of potatoes, delivered the same to the respondent, who shipped them in part to dealers in San Francisco, California, and in part to dealers in Seattle, Washington. It is the claim of the consignors of the potatoes that they sold the same to the respondent at agreed prices, a part at the rate of 55 cents per hundred pounds, and a part at the rate

[1]Reported in 106 Pac. 619.

of 54 cents per hundred pounds, while it is the claim of the respondent that the potatoes were consigned to him on commission to ship and sell for the highest price obtainable, and that he had sold them for the highest price obtainable, and that he had accounted to the consignors for the potatoes in so far as he had himself received returns from the sales. To determine their respective disputes, the consignors assigned their claims to the appellant, who instituted this action to recover the unpaid balances. The court found that the respondent was acting as a commission broker when he received and sold the potatoes, and entered judgment accordingly.

On the question of fact we are convinced that the court reached an erroneous conclusion. No doubt the respondent when he contracted with his consignors expected to ship the potatoes to dealers and there sell them, but his conduct clearly forbids the conclusion that he was acting as a commission merchant. When he bargained for the potatoes he fixed the price the consignors were to receive therefor at 55 cents and 54 cents per hundred pounds, and of course anything received above that price was to be his profit. He made no effort to keep the potatoes of each vendor separate in his own shipments; on the contrary, the potatoes of the different consignors were intermingled and shipped in bulk, so that when the returns came in and certain of the potatoes were returned as unmarketable, the respondent was unable to tell whose potatoes they were. Again, no books were kept showing the names of the consignors of the potatoes, their condition when received, the name of the person to whom they were sold, with the amount and date of sale, etc., as required by the statute. Laws 1907, p. 267, § 3 (Rem. & Bal. Code, § 7026). Nor did the respondent, in so far as the record shows, make known until the time of the trial the names of the parties to whom he had sold the potatoes. Moreover, the testimony of all the consignors was to the effect that they had sold the respondent the potatoes directly,

and the weight of the evidence, even if we disregard the circumstances, seems to us to be with the appellant. We think, therefore, that it is too much to say that the respondent was acting merely as a dealer selling on commission when he received the consignments in question.

The conclusion we have reached on the facts warrants a recovery on the part of the appellant. In determining the sum to be recovered the trial court should allow as a credit, in addition to the several sums paid the consignors, a deduction for the potatoes returned as "spoiled" or unmarketable. While the respondent could not, perhaps, have deducted this against any single one of his consignors had they sued him individually, it is proper, since the claims are all now in one ownership, that the deduction be made from the entire mass.

Subsequent to the commencement of the action the respondent paid into court an additional sum to be credited on the account. This sum was withdrawn by the appellant's counsel, and it is now insisted that this withdrawal was a settlement of the controversy and operated as a payment of the balance claimed to be due. But the payment into court was made for the benefit of the appellant and his assignees, and was made without condition of any kind. The money was, therefore, the appellant's property and no penalty attached to his taking it. Of course, it operated as a payment *pro tanto* of his claim, and he can now have a judgment for the balance due only, but this is the extent of his liability for taking the money. The withdrawal of the sum paid did not constitute an abandonment of his cause of action for the balance remaining due. *Tilden v. Gordon & Co.*, 34 Wash. 92, 74 Pac. 1016.

The judgment appealed from is reversed, and the cause remanded with instructions to take an accounting on the basis suggested in the opinion and enter judgment for the appellant for the amount found to be due.

[No. 8353. Department One. January 28, 1910.]

## CARRIE WILHELM, *Appellant*, v. FRANK J. WILHELM, *Respondent*.[1]

DIVORCE—CRUELTY—EVIDENCE—SUFFICIENCY. Findings that there was no cruelty warranting a divorce are sustained, where it appears that quarrels and bickerings prompted the wife to consult attorneys about a divorce a few days after the marriage, that she left him several times and returned, and commenced the action within two and a half months after the marriage; disappointment as to property and ill feeling between the husband and his wife's parents appearing to be the principal cause of their trouble.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 20, 1909, dismissing an action for divorce, after a hearing before the court. Affirmed.

*Thomas B. MacMahon*, for appellant.

*Revelle, Revelle & Revelle*, for respondent.

MORRIS, J.—Action for divorce upon the ground of cruelty, decree for defendant, and plaintiff appeals.

The parties to this action were married August 22, 1908. On November 9, following, this action was commenced, the complaint alleging cruelty. The first act of physical violence testified to by the appellant, in which she was corroborated by her mother, was on September 10. Other acts are complained of between that date and November 6, when the final separation took place. No witnesses other than appellant testified to these subsequent acts. The trial judge recited in his oral findings that he did not believe from the evidence that respondent had committed the acts of physical violence charged against him, and thereupon dismissed the action.

There is evidence of quarrels and bickering between the parties, which impressed the trial court as being caused by a

[1]Reported in 106 Pac. 627.

bitterness existing between respondent and the parents of appellant. It would appear from the evidence that there was some disappointment on the part of appellant and her parents because, shortly before his marriage, respondent conveyed some property to his mother, which fact was not learned by appellant until after the marriage; and respondent contends that this disappointment was the cause of the ill feeling between himself and the parents of appellant, and was a very large factor in the trouble between himself and his wife. The trial judge was evidently impressed with this belief, and his remarks at the conclusion of the trial indicate that, after listening to all the evidence, seeing the parties before him, being in a position to form an opinion as to their temper, disposition, and other elements of character that influence and affect the marital relation, he thought the young people would get along all right away from the influence of the wife's parents.

Some time in the latter part of August and within a few days after the marriage and before the happening of September 10, which was the first act of violence testified to, the wife consulted an attorney relative to obtaining a divorce. The record does not disclose any reason for such action on the part of the wife, except the general one that they quarreled from the first. At that time she left their home and went to her parents. Again on October 15 she left again. Each of these times the husband seems to have been able to persuade her to return. The whole record is convincing that the appellant did not endeavor to the extent of her full duty as a wife to smooth over the troubles and differences between herself and husband. The age of the husband is not given; the wife was nineteen, and the history of their married life reads more like quarrels and bickering of two petulant children than an honest attempt to realize the responsibilities of their new relation and to conform to its requirements. We have no desire to enter upon any homily upon the marriage relation, but consulting lawyers concerning a divorce within a

few days after marriage, leaving the home and returning to the parents three times, and finally bringing an action for divorce within two and a half months after the marriage, under the circumstances disclosed in this record, does not impress us as being an attempt to exercise that mutual charity and forbearance that is demanded between husband and wife. We do not mean to be understood that we believe in any fixed time in which divorce may not be decreed. Sufficient cruelty may develop within two months, as well as within two years, to entitle the injured party to relief. But from the record before us we are not satisfied that we have such a case here, and the judgment is affirmed.

RUDKIN, C. J., GOSE, CHADWICK, and FULLERTON, JJ., concur.

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[No. 8370. Department One. January 28, 1910.]

WILL H. MERRITT *et al.*, *Appellants* v. EFFIE LILLYBLADE *et al.*, *Respondents*.[1]

LANDLORD AND TENANT—LEASE—ASSIGNMENT. A contract to transfer a lease by a good title is provisional where the assignee knows that the lease contains a clause prohibiting assignment without consent of the landlord.

BROKERS—COMMISSIONS—FAILURE OF TITLE—TRANSFER OF LEASE. A broker is not entitled to a commission for effecting a sale of a leasehold where the contract of sale was provisional, being dependent upon securing the landlord's consent to the assignment of the lease or the execution of a new lease on terms refused by the landlord, and the contract of sale required a good title.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 9, 1909, upon granting a nonsuit at the close of plaintiff's case, dismissing an action for a broker's commission. Affirmed.

[1]Reported in 106 Pac. 621.

*James B. Kinne* and *Blaine, Tucker & Hyland*, for appellants.

*Jay C. Allen*, for respondents.

Gose, J.—The plaintiffs, a copartnership, commenced this action to recover a broker's commission. At the close of their case a nonsuit was granted on the motion of the defendants, and a cost judgment entered in their behalf. The plaintiffs have appealed.

The complaint charges that the respondents were the owners of the furniture in the Shirley hotel in the city of Seattle, and had a leasehold interest in the hotel; that they were desirous of selling the furniture, their good will in the business, and their leasehold interest, and that they employed the appellants to procure a purchaser; that the appellants procured a purchaser, ready, able, and willing to buy the property upon terms approved by the respondents, and that the respondents, having entered into a written contract of sale with the purchaser, refused to perform the contract. The written contract which it is asserted the respondents breached is as follows:

"Seattle, Wash., March 28, 1908.

"Received of John Quinn the sum of Five Hundred Dollars ($500) to apply on the contract for the purchase of all the furnishings and furniture of every kind, name and nature located in and about the Shirley Hotel, located at 1516, 5th Avenue, in the City of Seattle, King county, Washington. The full purchase price of said property is $18,000, payable as follows: $8,000 cash in hand, including the amount of this receipt, and $4,000, which stands as a furniture lien or contract in favor of the Standard Furniture Company, and $6,000 to be paid in two equal payments of $3,000 each on or before one and two years from the date of closing this deal, with interest thereon at the rate of seven per cent per annum, interest payable semi-annually. The said purchaser is to be furnished a good, complete and sufficient title to the said property, and also a lease on said property, ending three years from about the 1st day of June, 1908, at a monthly rental of $650 per month. Said lease to include the heat and

hot and cold water used in said hotel. That the said John Quinn shall be allowed ten days for the examination of the title to said property; whereupon he agrees to complete the purchase in the manner and upon the terms therein; and upon his failure so to do the said sum of money hereby receipted for shall at the option of the Merritt Realty Co. be forfeited as liquidated damages. It being understood that one-half of the said deposit shall be retained by the Merritt Realty Co. and the other half to go to the vendor herein, as forfeited or liquidated damages.

"It is further understood and agreed that in the event that title cannot be made good by vendor herein, or that the lease cannot be transferred as hereinabove stated within 20 days of the date hereof, that the said sum of money hereby receipted for shall be refunded.

"Merritt Realty Co. By Will H. Merritt, Agent.

"Subject to the owner's approval, I hereby agree to the above provisions. John Quinn, Purchaser.

"The above provisions and agreements are hereby accepted.

"Effie Lillyblade, Owner."

The uncontroverted facts are, that the respondents had a lease upon the hotel, beginning about April 1, 1906, and expiring April 1, 1911, at a monthly rental of $610, subject to the express condition that the lessees "will not assign this lease or any interest therein without the written consent of the parties of the first part," the owners; that the appellants knew of the nonassignment clause in the lease before they procured the written contract; that they knew that the owner of the hotel would not consent to the assignment of the lease, and that a new lease would be required. The appellant who negotiated the sale prepared the contract and testified that he was to sell the furniture and the lease. We think the contract of sale was a provisional one. It recites that "the said purchaser is to be furnished a good, complete, and sufficient title to said property, and also a lease on said property ending three years from about the 1st day of June, 1908, at a monthly rental of $650 per month, said lease to

include the heat and hot and cold water used in said hotel." The concluding clause provides:

"It is further understood and agreed that in the event the title cannot be made good by the vendor herein or that the lease cannot be transferred as hereinbefore stated within twenty days of the date hereof, that the said sum of money hereby receipted for shall be refunded."

The sale failed of consummation because the owner would not permit the assignment of the lease and would not execute a lease requiring him to furnish the water at a monthly rental of $650. In the respondents' lease the landlord furnished the steam to heat both the building and the water, but did not furnish the water. He was willing to assume a like obligation in the new lease. The contract read as an entirety, although somewhat obscure, contemplates that, if the landlord will not make a lease of the hotel at $650 per month with hot and cold water furnished, the money advanced on the contract shall be returned to the purchaser and the contract extinguished. It seems clear, therefore, that the sale was a conditional or provisional one, and that it was not the intention of the parties to require of the respondents more than a readiness on their part to convey a good title to the furniture and transfer the lease. The right of the appellants to recover a commission rests in parol. The record discloses that they were to have a commission for selling the furniture and the respondents' leasehold interest. This they did not do. As was said in *Condict v. Cowdrey*, 139 N. Y. 273, 34 N. E. 781:

"By the contract between the plaintiff and defendant he was not entitled to commissions, unless there was an actual sale of the property effected through his agency. It must appear to have been a binding and enforcible agreement for the sale . . . and it is not sufficient to show a provisional arrangement which has failed because of the nonfulfillment of a condition not dependent upon the action of the vendor."

It is evident that the leasehold could not be transferred or a new lease obtained without the consent of the owner of the

property, and that his consent could not be obtained. The sale, therefore, was dependent upon this condition, and its nonfulfillment creates no liability against the respondents. Moreover, if we treat the contract as ambiguous in this respect, the appellant's testimony, as we have seen, leads to the same end. The record does not present a case where the broker made an actual unconditional sale which was defeated on account of a defective title in the vendor, but rather, as we have seen, a provisional one depending upon the assent of a third party.

The judgment will be affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

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[No. 8428. Department Two. January 28, 1910.]

## ALLEN & NELSON MILL COMPANY, *Appellant*, v. W. E. VAUGHN *et al.*, *Respondents*.[1]

APPEAL—ORDERS APPEALABLE—FINALITY—STIPULATIONS—RIGHT TO APPEAL. An appeal from an order denying a temporary injunction will not be dismissed where the parties stipulated that it should be considered as a final order for the purposes of the appeal.

LOGS AND LOGGING—TIMBER—SALE—REMOVAL. Where a deed of all standing and lying timber contained an agreement that the grantee shall have three years from and after its date within which to "remove the timber," the grantee's interest ceases as to all timber not removed after that date, which then reverts to the grantor; since the intent of the parties controls the construction irrespective of distinctions between covenants and forfeitures or other technical questions.

Appeal from an order of the superior court for King county, Main, J., entered May 19, 1909, denying an injunction to restrain the removal of timber, in an action to quiet title. Reversed.

[1]Reported in 106 Pac. 622.

*Edwin H. Flueck* (*Walter G. Loewe*, of counsel), for appellant: Time is of the essence of the contract. *Taylor Brown Timber Co. v. Wolf Creek Coal Co.*, 32 Ky. Law 1015, 107 S. W. 733; *Sanders v. Clark*, 22 Iowa 275. The stipulation as to time for removal operates as a limitation. *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93; *Bunch v. Elizabeth City Lumber Co.*, 134 N. C. 116, 46 S. E. 24; *Hollensteiner v. Missoula Lumber Co.*, 37 Mont. 278, 96 Pac. 420; *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574; *King v. Merriman*, 38 Minn. 47, 35 N. W. 570. Equity will follow the plain intention of the parties even though it lead to what may be in the nature of a forfeiture. *Western Lime & Cement Co. v. Copper River Land Co.*, 138 Wis. 404, 120 N. W. 277; *Davis v. Frazier*, 150 N. C. 447, 64 S. E. 200; *St. Louis Cypress Co. v. Thibodaux*, 120 La. 834, 45 South. 742. If the limitation has run the purchasers are trespassers when they go upon the land. *Lehtonen v. Marysville Water & Power Co.*, 50 Wash. 359, 97 Pac. 292; *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93; *Erskine v. Savage*, 96 Me. 57, 51 Atl. 242; *Boults v. Mitchell*, 15 Pa. St. 371, cited in *Mahan v. Clark* (Pa.), 68 Atl. 667. Standing timber upon the expiration of the time limited reverts to the owner of the fee. *Pease v. Gibson*, 6 Me. 81; *Putney v. Day*, 6 N. H. 430; *Preston v. Hill-Wilson Shingle Co.*, 50 Wash. 377, 97 Pac. 293; 28 Am. & Eng. Ency. Law (2d ed.), p. 543; *Carroll Oates etc. Barrel Co. v. Yeargen* (Ky)., 115 S. W. 794; *Jackson v. Hardin*, 27 Ky. Law 1110, 87 S. W. 1119; *Saltonstall v. Little*, 90 Pa. St. 422, 35 Am. Rep. 683; *Hawkins v. Goldsboro Lumber Co.*, 130 N. C. 160, 51 S. E. 852; *Davis v. Frazier*, *supra*; *Sanders v. Clark*, 22 Iowa 275; *Howard v. Lincoln*, 13 Me. 122; *Prentiss v. Ross' Estate*, 96 Mich. 83, 55 N. W. 613; *Macomber v. Detroit L. & N. R. Co.*, 108 Mich. 491, 66 N. W. 376, 62 Am. St. 713, 32 L. R. A. 102; *Reed v. Merrifield*, 10 Met. (Mass.) 155; *Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574; *Rich v. Zeilsdorff*, 22 Wis. 544, 99 Am. Dec.

81; *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862; *Haskell v. Ayres*, 32 Mich. 93; *Strasson v. Montgomery*, 32 Wis. 52; *King v. Merriman*, 38 Minn. 47, 35 N. W. 570; *McIntyre v. Barnard*, 1 Sandf. Ch. (N. Y.) 52; *Perkins v. Stockwell*, 131 Mass. 529; *Broussard v. Verret*, 43 La. Ann. 929, 9 South. 905; *Webber v. Proctor*, 89 Me. 404, 36 Atl. 631; *Kellam v. McKinstry*, 69 N. Y. 264; *Richards v. Tozer*, 27 Mich. 451; *Martin v. Gilson*, 37 Wis. 360; *Kemble v. Dresser*, 1 Met. (Mass.) 271, 35 Am. Dec. 364; *French v. Sparrow-Kroll Lumber Co.*, 135 Mich. 424, 97 N. W. 961; *Michigan Iron & Land Co. v. Nester*, 147 Mich. 599, 111 N. W. 177; *Johnson v. Moore*, 28 Mich. 3; *McNeil v. Hall*, 94 N. Y. Supp. 920; *Inderlied v. Whaley*, 20 N. Y. Supp. 183; *Grange v. Palmer*, 10 N. Y. Supp. 201; *Hawkins v. Goldsboro Lumber Co., supra; White v. Foster*, 102 Mass. 375; *Dickey v. Gray Lumber Co.*, 127 Ga. 460, 56 S. E. 481; *Hodges v. Buell*, 134 Mich. 162, 95 N. W. 1078; *Noyes v. Goding*, 104 Me. 453, 72 Atl. 181. Timber cut but not removed prior to the expiration of the time limited belongs to the owner of the fee. *St. Louis Cypress Co. v. Thibodaux, supra; Clark v. Ingram-Day Lumber Co.*, 90 Miss. 479, 43 South. 813; *Midyette v. Grubbs*, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278; *Mengal Box Co. v. Moore & McFerrin*, 114 Tenn. 596, 87 S. W. 415; *Ford Lumber & Mfg. Co. v. Cress* (Ky.), 116 S. W. 710; *Beauchamp v. Williams* (Tex. Civ. App.), 115 S. W. 130; *Lodwick Lumber Co. v. Taylor*, 100 Tex. 270, 98 S. W. 238, 123 Am. St. 803; *Id.* (Tex.), 99 S. W. 192; *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513, 524; *McNeil v. Hall, supra; Hodges v. Buell*, 134 Mich. 162, 95 N. W. 1078; *Boring Lumber Co. v. Boots*, 49 Ore. 569, 90 Pac. 487.

*James McNeny*, for respondents, contended that the title passed to timber cut and severed within the time limit. *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Green v. Bennett*, 23 Mich. *464; *Halstead v. Jessup*, 150 Ind. 85, 49

N. E. 821; *Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 42 South. 858, 123 Am. St. 58, 9 L. R. A. (N. S.) 663; *Rawson v. Inhabitants of School District No. 5*, 7 Allen 125, 83 Am. Dec. 670; *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193; *Johnson v. Truitt*, 122 Ga. 327, 50 S. E. 135; *Golden v. Glock*, 57 Wis. 118, 46 Am. Rep. 32; *Hicks v. Smith*, 77 Wis. 146, 46 N. W. 133; *Macomber v. Detroit L. & M. R. Co.*, 108 Mich. 491, 66 N. W. 376, 62 Am. St. 713; *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93; *Hodges v. Buell*, 134 Mich. 162, 95 N. W. 1078; *Alexander v. Bauer*, 94 Minn. 174, 102 N. W. 387; *Mahan v. Clark*, 219 Pa. 229, 68 Atl. 667; *Strong v. Eddy*, 40 Vt. 547; *Erskine v. Savage*, 96 Me. 57, 51 Atl. 242; *Pease v. Gibson*, 6 Me. 81; *Plummer v. Reeves*, 83 Ark. 10, 102 S. W. 376. The action is in equity, and equity will not aid or enforce a forfeiture. *Hodges v. Buell, supra; Crane v. Dwyer*, 9 Mich. 350, 80 Am. Dec. 87; *Gallaher v. Herbert*, 117 Ill. 160, 7 N. E. 511; *Douglas v. Union Mutual Life Ins. Co.*, 127 Ill. 101, 20 N. E. 51; *Horsburg v. Baker*, 1 Pet. (U. S.) 232; *Skinner v. Dayton*, 2 Johns. Ch. (N. Y.) 526; *Clark v. Drake*, 3 Pin. (Wis.) 228; *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57.

DUNBAR, J.—This is an action to quiet title to a certain tract of land, and particularly to remove the cloud of a certain timber deed, in which action the plaintiff sought to enjoin the defendants from further removal of timber from said land under said deed or contract. The timber deed was as follows:

"This agreement by and between Charles Smith & Elizabeth Smith, his wife, parties of the first part and W. E. Vaughn and Sons parties of the second part, witnesseth:

"That for and in consideration of the sum of $2,000 cash in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, the parties of the first part do hereby sell, convey and warrant to said parties of the second part all the timber of every kind and description standing, lying or being upon the following described

real estate situated in King county, state of Washington and particularly described as follows, to wit: The E½ of the SW ¼ and the W ½ of the SE¼ of section 14 township 24 north range 6 East. It is further agreed that said parties of the second part may construct, maintain and use all logging roads and skid roads which said parties of the second part may deem necessary or convenient upon or across said land at any time within ten years after the date of this agreement. It is further agreed that said parties of the second part shall have three years from and after the date hereof within which to remove said timber. It is further agreed that all the terms and conditions of this agreement shall be binding upon the parties thereto and their and each of their heirs, executors and administrators.

"Witness our hands and seals this 24th day of April, A. D. 1906. Chas. Smith (Seal)
"Elizabeth Smith (Seal)"

This deed was duly signed and acknowledged. All the timber not having been removed at the expiration of the time mentioned in the deed, defendants were cited to appear on the 7th day of May, 1909, to show cause why a temporary injunction pending the hearing on the merits should not issue restraining them from further removal of the timber cut or standing upon said premises. On May 19, 1909, the superior court of King county held that, under the contract above set forth, the title to the timber standing on the land upon the expiration of the time mentioned, to wit, the 24th day of April, 1909, reverted immediately after said date to the plaintiff, and that the title to the timber cut from said land, but still remaining on the same, was left in the purchaser, and an order was made to the effect that the purchasers, and any one claiming under them, should be restrained from further cutting of timber, that the temporary order in relation to further hauling of timber which had already been cut should be dissolved, and an injunction as to that class of timber denied. It was stipulated that the order be treated as a final order for the purposes of appeal.

The respondents have moved to dismiss this appeal, but

in consideration of the stipulations entered into between appellant and respondents, the motion will be denied.

It will be seen that the point of controversy in this case involves the construction of the deed, and especially that portion providing for the removal of the timber within three years. It appears from an affidavit in the case that the provision of the deed in relation to the construction and maintaining of a logging road across the land had reference to the permission of a right of way for hauling other timber not upon the land in question, and this must necessarily have been the theory of the contractors; otherwise it would have been in plain contradiction of the other provision of the contract in relation to removal of timber. The attorneys in this action have, with great industry and research, presented an array of authorities on this subject an examination of which shows that the courts are lamentably divided, so that it would be profitless to enter upon a detailed examination and analysis of the many different cases cited.

Our own view is that this contract should be construed as any other contract for the purpose of ascertaining what was intended by the contracting parties, and in so construing it we conclude that it was the intention of the parties that the purchaser should have the three years specified for a removal of the timber whether standing or lying down, and that at the expiration of that time his interest in the timber should cease, and that the title to the timber would then be in the person owning the land. What possible interest would the seller have in the date when the timber should be cut down, if there was to be no limit on the time of its removal from the land? That would be a matter which would be of interest only to the buyer, and concerning which he would not be likely to counsel or contract with the seller. In many of the contracts which have been construed by the courts, the language is "cut and remove," but it is evident that the main consideration, even in those cases, is the removal. Just how the removal is to be effected is not of interest to the seller.

The great desideratum to him is the recovery of the possession of his land at the time specified. A man might reasonably be willing to sell timber on land at a certain price if the unobstructed possession of the land were assured to him in three years, when he would demand a greater price, or perhaps refuse to sell at all, if he could not regain the premises for five years or for some longer period. He is not in any way benefited by cutting the timber down and cumbering the ground with fallen trees. So far as his use of the ground is concerned the trees had better be left standing.

Some of the courts, driven to assign reasons to support an unreasonable construction, have advanced the idea that the seller has no just cause for complaint, and cannot be injured, even if he cannot obtain possession of his land after the trees are cut down, because his land is no longer being exhausted by furnishing sustenance to a living tree. But, in addition to the fact that most trees return to the soil as much as they take from it, and that many varieties of trees obtain their sustenance principally from the atmosphere and, like leguminous plants that extract nitrogen from the air and store it in the ground in the shape of nitrogen nodules, their growth benefits instead of exhausts the soil, these theories are too fine spun to receive consideration in the common-sense construction of a practical contract. Many of the cases are also based upon the conclusion that a provision of this kind is a covenant rather than a forfeiture, but this is dealing with definitions rather than principles, for the carrying out of covenants sometimes necessarily works a forfeiture. Neither is it profitable to enter into a discussion of technical distinctions between real estate and personal property. Such distinctions tend to lead away from the essential idea, viz., what was the intention of the parties to the contract under consideration. Of course, it is elementary that forfeitures are not favored, but when the contract executed by the parties, either by express provision or by necessary implication, provides for a forfeiture, it will be enforced.

All of these technical questions have been determined by this court in *Lehtonen v. Marysville Water & Power Co.*, 50 Wash. 359, 97 Pac. 292; and while in that case it was only standing timber that was in question, the technical question of what constitutes a forfeiture, the character of the property, etc., and the construction of the agreement in its essential particulars, were the same as are involved here. In that case the respondent sold to the appellant a certain tract of land, but reserved to the grantor the standing timber under a clause requiring its removal within two years, and it was held that the timber reverted to the owner of the land if it was not removed within the time fixed. There it was said:

"Whether the reservation of the timber made it, in legal effect, personal property or otherwise, makes no difference. It is immaterial what the theoretical character becomes. The contract of reservation provides that it shall be removed within a given time. If it was the intention of the parties that the timber might be removed after that time, the limitation means nothing and was misleading."

The case at issue is a stronger case than most of the cases reported, for the question of cutting is eliminated. The contract is that the timber shall be removed and, as was said in the case just quoted, "if it was the intention of the parties that the timber might be removed after that time, the limitation means nothing and was misleading." The condition of the timber as to its being standing or fallen does not affect the meaning of the word. All of the provisions of this contract must be construed together, and when the provision with relation to the time of removal is construed in connection with the last provision, viz., that it is further agreed that "all the terms and conditions of this agreement shall be binding upon the parties thereto," certainly the respondent cannot escape the important provision providing the time within which he is permitted to remove the timber. He knew that, under the plain provisions of his contract—and it is difficult to see how it could be made plainer—he had three years from the date of the contract in which to remove the

timber. His action in cutting more timber than he could or would remove in that time was an evasion of both the letter and spirit of his contract, and he must suffer the consequences of his own failure to comply with the contract. This construction also does away with the illogical holding of some of the courts that, notwithstanding the fact that the contract must be construed as preventing the removal within the time specified, yet the purchaser has a right to the property even though asserting dominion over the property places him in the role of a trespasser.

The judgment will be reversed, and the cause remanded with instructions to proceed in accordance with this opinion.

RUDKIN, C. J., MOUNT, PARKER, and CROW, JJ., concur.

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[No. 8455. Department Two. January 28, 1910.]

## P. E. ARIES, *Respondent*, v. ANN MARIE QUAGLIA, *Executrix, etc., Appellant.*[1]

INDEMNITY—CONTRACT—CONSTRUCTION. Defendant's contract to hold the plaintiff harmless from all liability for the rent of certain premises, to the end that plaintiff be released from the payment of any part of said rents, indemnifies the plaintiff from liability upon a contract to pay $25 per month "as a part of the rental of said premises," made in consideration of the execution of a lease to plaintiff's company at $225 per month; and the fact that the $25 was to be paid by plaintiff whether the premises would be occupied or not, does not render it a mere bonus, and not part of the rent, the defendant having notice of the contract calling for the payment as part of the rent.

Appeal from a judgment of the superior court for King county, Gay, J., entered June 24, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a contract of indemnity. Affirmed.

[1]Reported in 106 Pac. 615.

*McBurney & Cummings*, for appellant.

*Frank B. Wiestling*, for respondent.

DUNBAR, J.—This is an appeal from a judgment of the superior court for King county in favor of the respondent. The action was one upon a contract of indemnity. One M. F. Backus was the owner of the property, which was rented to the Seattle Brewing & Malting Company. For the purpose of getting a sublease of the premises, the respondent entered into a contract with Backus, the essential part of which is as follows:

"That in consideration of the execution of a lease by the said M. F. Backus to the Seattle Brewing & Malting Company, bearing even date herewith, for the premises above described, and for the consideration to be paid by the Seattle Brewing & Malting Company, as above described, the parties of the second part hereto agree to pay to said M. F. Backus, at the Washington National Bank in the city of Seattle, state of Washington, or at the office of the successor of said bank, the sum of $25 per month in advance for the period of two years commencing on the 1st day of June, 1907, and ending on the 31st day of May, 1909; and the parties of the second part agree to pay said sum as a part of the rental for the said premises to the Seattle Brewing & Malting Company whether they, the parties of the second part, shall or shall not occupy the said premises as tenants of the Seattle Brewing & Malting Company during the period covered by the lease of the said M. F. Backus to the said Seattle Brewing & Malting Company. (Duly signed.)"

The rental for the premises from Backus to the malting company had been $225 per month, and this was in effect insuring Backus $25 more a month for the rent of the premises. The sublease was obtained by the respondent, the agreements all being contemporary agreements, the contract between Backus and respondent being executed at the same time that the lease to the brewing company was executed. Subsequently the respondent rented the premises to Michele Quaglia, and an agreement was entered into between them

concerning the business, much of which it is not necessary to set forth here, the pertinent part being as follows:

"And besides, for value received, the said Quaglia does hereby for value received, agree to save and hold harmless the said P. E. Aries and the said J. Andriano and each of them from the payment of money now due and owing or to become due and owing, and from all liability arising out of rents in connection with the said premises at 309 Second avenue south, due or to become due, or accruing, to the end that said P. E. Aries and the said J. Andriano and each of them will be released by the said Quaglia from the payment of any part of said rents and liability under the holding of possession of said premises."

And other payments were provided for in the agreement. In the course of time Backus sued the respondent in this case for nonpayment of the $25 per month rental as agreed upon, in the sum of $425. When the summons and complaint were served upon the respondent, he gave due notice to Quaglia, demanding that he should defend the action. Said Quaglia paid no attention to this notice. The respondent defended the action, but judgment was entered against him for the amount asked for, and this is an action by the respondent against Michele Quaglia to recover the amount of the judgment which he was compelled to pay Backus.

It is the contention of the appellant, that the liability of the respondent to Backus was not included in the terms of the contract of indemnity sued on herein; that this contract with Backus by the respondent had no reference to rent, but was purely and simply a bonus to actuate him to rent the premises to the malting company; that the respondent might obtain a profitable sublease from the malting company. But a reading of the contract itself between Backus and the respondent conclusively shows that, whatever may have been the arrangement or the conditions of the contract, the intention and effect was to increase the rental from $225 to $250 a month. In fact, the language is explicit on that proposition, as shown by the quotation, "and the parties of

the second part agree to pay said sum as a part of the rental for the said premises to the Seattle Brewing & Malting Company." The appellant urges that the further stipulation that they would pay that amount whether the parties of the second part should occupy the said premises as tenants of the Seattle Brewing & Malting Company or not, tends to show that it was not the intention that the contract should be one of rental, but simply one of bonus. But we hardly see how this provision in the contract could affect that question, or how it could work any different interpretation of the direct provision and statement that it was paid as a part of the rental of the premises, especially in view of the fact that the lease to the brewing company and the contract with Backus and the sublease to the respondent were contemporaneous. That the liability was included in the terms of the contract of indemnity sued on is evidenced by the fact that they hold Aries and Andriano harmless from all liability arising out of rents in connection with such premises, and from the payment of any part of said rents and liabilities under the holding of possession of said premises. Certainly this was a liability under the holding of the possession of said premises. A liability of the respondent to Backus being such liability must have been covered by the contract between Backus and Quaglia.

The next proposition urged is that, assuming that an obligation of the character of the respondent's liability to Backus was included in the terms of the contract of indemnity, the evidence was sufficient to sustain the appellant's contention that Quaglia's signature to the contract of indemnity was secured through the misrepresentation of the respondent. On that proposition the court found that, when the contract was entered into between the respondent and Quaglia, the latter knew of the liability from the respondent to Backus and assumed the same, and knew of the claim for additional rent of the said premises on the part of said Backus and assumed the same. The court also found that

on the 10th of March, 1908, the respondent was sued by Backus on his breach of the condition of the contract, and judgment recovered, that due notice was given, and that Quaglia had refused and neglected, and still refuses, to pay off the said liability; and, as a conclusion of law, that the respondent was entitled to judgment against Quaglia for the sum of $425, with interest, etc.

We think, without an extended review of the testimony, that the court was justified in finding that Quaglia was not induced to sign the contract which he did sign through any fraud, deceit, or concealment on the part of the respondent; but that the evidence shows that at least, whatever Quaglia's understanding of things may have been, his acknowledged agent in the transaction—Mr. Buty—was fully aware of this liability on the part of the respondent in connection with the renting of this house. It is true that, while they were talking about the matter, the respondent, Quaglia, and the agent, Mr. Wiestling, attorney for the respondent, stated to them that he doubted if any consideration could be shown for the agreement between the respondent and Backus, and doubted if the contract could be enforced. But it was not a positive expression even of what the attorney thought the law was, and in any event, Quaglia knowing of the contract and knowing that he was bound to the respondent to pay all the contracts under which the respondent was obligated to Backus growing out of the rental of this property, it became his duty to defend the action against Backus for violation of that contract; and when he contracted to do so, he took his chances on the power of Backus to enforce such contract.

We are unable to discover any error of the court in any particular, and the judgment will be affirmed.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8176. Department Two. February 1, 1910.]

C. E. DIBBLE, *Plaintiff*, v. WASHINGTON FOOD COMPANY *et al.*, *Respondents*, G. A. CARVER *et al.*, *Appellants*.[1]

RECEIVERS — SALES — VACATION — LIMITATIONS — LACHES. A sale made by a receiver to his business associate, confirmed by the court, will not be vacated for fraud and inadequacy of price, where it appears from the petition that the applicants knew of the business relationship of the purchaser and the inadequacy of price at the time of the sale and confirmation, and did not file their petition within one year as required by Rem. & Bal. Code, § 466, but waited several years until sued for unpaid stock subscriptions.

Appeal from an order of the superior court for King county, Morris, J., entered February 16, 1909, dismissing an application to vacate a receiver's sale, upon sustaining demurrers to the petition. Affirmed.

*Charles R. Crouch*, for appellants.

*H. R. Clise* (*Geo. H. King*, of counsel), for respondent Cox.

*J. P. Wall*, for respondent Mackie *et al.*

CROW, J.—In this action one E. B. Cox was appointed receiver of Washington Food Company, a corporation, and thereafter sold its real estate to one A. W. Mackie. The sale was finally confirmed in May, 1905, but its proceeds being insufficient to satisfy the claims of creditors, actions were prosecuted by the receiver against stockholders of the corporation for unpaid subscriptions. In January, 1909, G. A. Carver and ten other stockholders filed their petition to vacate the sale and order of confirmation. To this petition the receiver and A. W. Mackie interposed demurrers, which were sustained, and the stockholders have appealed from an order of dismissal.

Matters outside of the record will not be considered, although discussed in the briefs. The only question before us

[1]Reported in 106 Pac. 760.

is the sufficiency of the petition. It in substance alleged that E. B. Cox and A. W. Mackie were delegated by the stockholders to appear in this action and resist the receivership, but that they so represented matters to the court that Cox was appointed receiver; that shortly thereafter the real estate was ordered sold at private sale; that Cox received a written bid of $9,000 from Mackie, upon which the sale was made, reported, and confirmed; that the property was worth one hundred per cent more than the price bid; that the receiver and Cox, who were close business associates, conspired to effect the sale for an inadequate price, and that the petitioners had no knowledge of any of such fraudulent acts although they did know of the sale when made.

A statement of the allegations of the petition discloses its insufficiency. Appellants seem to predicate their claim for relief upon fraudulent conspiracy and inadequate price. No fraud can now be inferred or presumed from the mere fact that Cox and Mackie were business associates in some other enterprise, nor from the fact that at the commencement of this action they failed to avoid the appointment of a receiver. If the property actually sold for an inadequate price, the appellants have known that fact for a number of years. The order of confirmation finally adjudicated the rights of the interested parties. We infer that the appellants are now attempting to proceed by petition under Rem. & Bal. Code, § 464, but § 466 requires them to do so within one year. If they are not proceeding under § 464, then they are seeking the vacation of the sale for fraud not discovered by them until about the time they filed the petition. It, however, affirmatively shows that they had actual knowledge of the sale, the alleged inadequate price, and the business relationship of Cox and Mackie. If it is their contention that these circumstances constitute fraud, they were known to appellants at all times after their occurrence. If they do not constitute fraud, none has been pleaded. The petition indicates that the appellants

had no thought of attacking the sale until after they discovered they would be held liable for their unpaid stock subscriptions. They now attempt to have the sale vacated without explaining their long continued delay. In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 591, Miller, J., speaking of judicial sales, said:

"The doctrine is well settled, that the option to avoid such a sale must be exercised within a *reasonable* time. This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale and of the facts which render it voidable, the permanent or fluctuating character of the subject-matter of the transaction as affecting its value, and the actual rise or fall of the property in value during the period within which this option might have been exercised."

Appellants make no attempt to explain their long continued delay. They fail to show fraud. Their petition is devoid of merit. The demurrers were properly sustained, and the judgment is affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and MOUNT, JJ., concur.

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[No. 8029. Department Two. February 2, 1910.]

## *In re* PINE STREET, SEATTLE.[1]

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENTS—APPEAL—REVIEW. The limits of a special assessment district fixed by the commission, and the amount taxed against the general fund, will not be disturbed on appeal, where the limits do not appear to be unreasonable and the entire cost might have been assessed against the property.

SAME—FINDINGS—REVIEW. A special assessment will not be disturbed as unequal or unjust, where it rests upon opinion and the evidence is conflicting.

[1]Reported in 106 Pac. 755.

SAME — ASSESSMENT — INTEREST ON CONFIRMATION — AWARD. Interest upon an award on condemnation of property needed for a street improvement may be included as part of the cost of the improvement to be assessed against the property benefited.

SAME — AWARD — VERDICT — EFFECT — ASSESSMENT FOR BENEFITS. Upon condemnation of property needed for a street improvement, a verdict for the value of land taken, reciting that the remainder of the lot is not damaged by reason of the taking, precludes the claim that an award of damages was made therefor.

SAME—ASSESSMENTS—EXEMPTIONS—LANDS NOT TAKEN—EMINENT DOMAIN—VERDICT. Where the verdict for the value of land taken for a street improvement recites that the remainder was not damaged by the taking, the same is not exempt from assessment for special benefits as it would have been if found to be damaged by the taking.

Appeal from an order of the superior court for King county, Tallman, J., entered January 4, 1909, confirming an assessment roll, after a hearing before the court on the merits. Affirmed.

*Jay C. Allen*, for appellants Farnandis *et al.*

*Jas. A. Dougan*, for appellants Gow *et al.*

*Richard Saxe Jones*, for appellants Redelsheimer *et al.*

*James Kiefer*, for appellant John H. McGraw, contended, *inter alia*, that the interest cannot be allowed because not authorized by a statute. *Tacoma Bituminous Paving Co. v. Sternberg*, 26 Wash. 84, 66 Pac. 121; *Sargent v. Tuttle*, 67 Conn. 162, 34 Atl. 1028, 32 L. R. A. 822; *Murphy v. People*, 120 Ill. 234, 11 N. E. 202; *State ex rel. Brennert v. Farrier*, 47 N. J. L. 75; *Himmelman v. Oliver*, 34 Cal. 246; *Haskell v. Bartlett*, 34 Cal. 281.

*Scott Calhoun* and *Bruce C. Shorts*, for respondent.

MOUNT, J.—This appeal is prosecuted by several property owners from an order of the superior court of King county confirming an assessment roll to pay the cost of widening Pine street, in the city of Seattle. The city by ordinance provided for increasing the width of Pine street four-

teen feet, seven feet on each side, between the east side of First avenue and the west side of Twelfth avenue. The property, seven feet wide on each side of the street, was taken by condemnation proceedings. Judgments were entered in favor of the several owners for the value of the property taken. Afterwards an eminent domain commission was appointed for the purpose of assessing the cost of the improvements to the property specially benefited. This commission prepared and filed an assessment roll on the 12th day of June, 1908. Objections were made to this roll, and hearings thereon were continued until November 4, 1908, when, at the request of the corporation counsel, the court permitted the roll to be referred back to the board of eminent domain commissioners for the purpose of making corrections thereon. The board of eminent domain commissioners thereupon prepared a new assessment roll, which was filed in the superior court on November 23, 1908. This new roll was substantially the same as the original roll, except that it included an additional amount to cover interest upon the warrants issued in payment of the property taken, accruing between the date of the judgment in condemnation and the date when the assessment would become delinquent. Objections were made by all of these appellants, and evidence was heard by the court upon the equality and justness of the assessments as shown by the roll. Thereafter the court entered its order confirming the roll, with some slight modifications.

The appellants, being interested in different lots, have filed four separate briefs upon this appeal, but the points raised are all substantially the same. They are stated in the assignment of errors in one of the briefs as follows:

"(1) The court erred in approving the assessment roll as a whole, because (a) the proofs show that it is inequitable and unjust, as between the properties included, and does not include all property benefited; (b) a just proportion of the cost of the improvement is not assessed against the general fund, said improvement being largely for the benefit of the

public generally; (c) the amount assessed against the properties in the roll includes a sum of interest for which said properties cannot be legally made liable.

"(2) The court erred in overruling the objections of these appellants because appellants were awarded substantial compensation because of damage to the remainder of the property not taken upon a consideration of both benefits and damages, and therefore the property is exempt from assessment and should have been stricken from the roll."

The nature of these assignments has made it necessary for us to examine all the evidence in the case, which we have done. There was evidence to the effect that the improvements were a benefit to the property not included within the assessment district, but this evidence tended to show a general rather than a special benefit. The district was confined to the center of the blocks on each side of the street. It is always difficult to determine the exact dividing line where the special benefits cease and general benefits begin in this class of cases. The greatest special benefit, of course, attaches to the lots immediately abutting upon the street. But some special benefits necessarily attach to the lots and blocks distant therefrom, diminishing as the distance increases. The line must be drawn somewhere, and we think it is not unreasonably drawn at the center of the block, as was done in this case. The same principle is true at the termination of the district, lengthwise as laterally. There can be no exactness in the determination of such questions, and they must, therefore, be left to the best judgment of the persons authorized to fix the boundaries of the district. It is true that only a small part of the total cost of the improvement was finally assessed against the general fund, but, so far as the record shows, there was no obligation to assess the general fund at all. The whole improvement, notwithstanding, might have been made at the expense of the property specially benefited, without reference to the general benefits.

It is argued that the assessments are unequal and unjust in many particulars, but the evidence is conflicting upon this

point. This is a matter of opinion, and where opinions differ, as they do here, we shall not disturb the finding of the trial court upon that question. *In re Seattle*, 50 Wash. 402, 97 Pac. 444; *In re Elliott Avenue and Milwaukee Street*, 54 Wash. 297, 103 Pac. 20.

The holding of this court in *State ex rel. Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 848, to the effect that a judgment in condemnation for street improvements bears interest which must be paid as a part of the judgment, seems to dispose of the contention that the property assessed is not liable for an assessment for interest.

Finally, it is claimed that such property is exempt from assessments for benefits, because an award of damages was made for the property not taken. The verdicts in the condemnation proceedings were offered in evidence. These verdicts show upon their face "that the remainder of said lot is not damaged by reason of the taking off of said described real property." The case of *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106, to the effect that property not taken, but damaged, may not be assessed, can therefore have no application to this case, because here there is an express finding that the property not taken is not damaged.

We find no error in the record. The order appealed from must therefore be affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8281. Department Two. February 2, 1910.]

# THE CITY OF SPOKANE, *Respondent*, v. JOHN F. COSTELLO *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS—CONTRACTS—ULTRA VIRES—ESTOPPEL TO PLEAD. Neither the sureties nor a city contractor, who was paid for defective work upon his giving bonds to repair and complete the work, can interpose the plea of *ultra vires* to escape liability on the bonds, where the giving was not prohibited by law.

ESTOPPEL—PLEADING—SUFFICIENCY. An estoppel is sufficiently pleaded where the facts constituting it are all set forth, although the pleading fails to state the conclusion that the facts constitute an estoppel.

PARTIES—BONDS. Under Rem. & Bal. Code, § 192, a contractor and the surety on his bond may be joined as parties defendant in an action on the bond.

EXECUTORS AND ADMINISTRATORS — ACTIONS — PARTIES—JOINDER—BONDS. The administrator of a deceased contractor, the principal on a bond, may, on rejection of the claim, be joined as a party defendant with the surety in an action on the bond; the proceedings for presenting claims against the estate and payment of judgments in course of administration making no difference in the nature of actions against administrators.

SAME—JUDGMENT AGAINST ADMINISTRATOR—FORM. A judgment against an administrator should contain directions for its payment in course of administration, as required by Rem. & Bal. Code, § 1483, but failure to do so is not ground for reversal, where it can be so understood, or amended on appeal.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 18, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a contractor's bonds. Affirmed.

*Hurn & Curtiss* and *Danson & Williams*, for appellants.

*E. O. Connor*, *John E. Blair*, and *Ernest E. Sargeant*, for respondent.

[1]Reported in 106 Pac. 764.

PARKER, J.—This is an appeal from a judgment rendered against defendants in an action upon two bonds. One is in words and figures as follows:

"Know all men by these presents, that Peter Costello, as principal, and the Fidelity & Deposit Company of Maryland, a corporation as surety, are held and firmly bound unto the City of Spokane, Washington, in the sum of Twelve Hundred ($1200.00) Dollars, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our (and in the case of said principal) heirs, executors, administrators and assigns, and (in the case of said surety) successors and assigns, jointly and severally, firmly by these presents.

"Signed and sealed and dated this 18th day of November, 1905.

"The condition of the above obligation is such, that,

"WHEREAS, the above bounden principal has this day completed a certain contract with the City of Spokane for the grading, curbing, parking and sidewalking of Third avenue from Regal to Sherman Streets, which contract amounted to the sum of Fourteen Thousand Eight Hundred ($14,800) Dollars, and whereas, in the opinion of the City Engineer certain portions of the sidewalk on said Avenue had been frozen to some extent and may need replacing.

"Now, therefore, if the said principal shall at any time within nine (9) months from the date hereof replace such portions of said sidewalk on said Avenue as may be now damaged by freezing, then this obligation to be void, otherwise to remain in full force and effect.

"Peter Costello.

"Fidelity & Deposit Co., of Maryland,

"By R. J. Danson, Its Attorney in Fact.

"Seal attached.

"ATTEST: W. S. McCrea, General Agent.

"I have examined the foregoing bond and find that the same has been properly and legally executed and is in accordance with the provisions of the charter and ordinances of the City of Spokane.

"Lester P. Edge, Ass't Corporation Counsel.

"Approved, Floyd L. Daggett, Mayor."

The other bond is the same, except it is for the sum of

$1,000 and relates to a similar improvement of Fourth avenue under a contract for $9,000. The facts necessary for us to notice were found by the trial court in substance as follows: On April 18, 1905, the city entered into a contract with Peter Costello whereby he was to furnish all the work and material for the improvement (including sidewalk) of Third avenue, the city agreeing to pay him therefor the sum of $14,890. Costello thereupon constructed the improvement. Prior to the acceptance and approval of the work by the board of public works, 2,400 lineal feet of the cement sidewalk was frozen during the progress of the work, and thereby rendered defective, and the board of public works refused to approve and accept the improvement. Costello then offered that if the city would pay him the amount due upon the contract, he would enter into a bond with the city, with surety, in the sum of $1,200, conditioned that he would, within nine months from November 18, 1905, replace such portion of the sidewalk as had been damaged by freezing. Thereupon the bond was executed and delivered to the city, when it paid Costello the amount due upon the contract. Costello did not replace, or cause to be replaced, the portion of the sidewalk so frozen and rendered defective, within the nine months, or at all, though requested by the city to do so through its board of public works. During October, 1906, the city replaced and repaired so much of the sidewalk as had been frozen and rendered defective, at an expense to it of $1,245.73.

On April 18, 1905, the city entered into another contract with Peter Costello, whereby he was to furnish all the work and material for the improvement (including sidewalk) of Fourth avenue, the city agreeing to pay him therefor the sum of $9,000. Costello thereupon constructed the improvement. Prior to the acceptance and approval of the work by the board of public works, 1,902 lineal feet of the cement sidewalk was frozen during the progress of the work, and thereby rendered defective, and the board of public works

refused to accept the improvement. Thereupon, the same arrangement for furnishing bond in the sum of $1,000 to repair the walk within nine months was made between Costello and the city, the bond was executed and delivered to the city, and the city paid Costello the amount due upon the contract. Costello did not replace, or cause to be replaced, the portion of the sidewalk so frozen and rendered defective, within the nine months, or at all, though requested so to do by the city through its board of public works. During September and October, 1906, the city replaced and repaired so much of the sidewalk as had been frozen and rendered defective, at an expense to it of $865.56.

Peter Costello having died before the commencement of this action, it was brought against the administrator of his estate and his surety upon the bonds. Judgment was rendered in favor of the city against the administrator and surety for $2,065.56, being the full amount of the $1,200 bond and the $865.56 expense incurred by the city under the $1,000 bond.

It is contended that the evidence was not sufficient to support the findings, especially as to the amount of damages sustained by the city. A careful reading of all of the evidence and admissions in the record convinces us, however, that the learned trial judge was fully justified in making the findings he did upon this question, as well as all the other findings. No useful purpose would be served by a review of the evidence here.

The largest part of the brief of learned counsel for appellants is devoted to an attack upon the power of the board of public works to enter into any such arrangement or contract as is evidenced by these bonds. Counsel have collected a great array of authorities bearing upon the contracting power of the city and its board of public works, arguing with much skill that paying Costello the whole of the contract price and taking from him these bonds to secure the proper completion of the improvement was not only irregular but

wholly without the power of the board of public works, rendering such action on its part *ultra vires* and void to the extent that such bonds can in no event support the recovery sought in this case.

It seems to us that, in view of the position in which we find these appellants, they cannot be permitted to raise any such question in defense of the claim which the city is making against them in this action. The arrangement entered into between the deceased and the city was wholly for his benefit, and resulted in his receiving full compensation for his work in the construction of the improvements before he was entitled thereto. It is difficult to see how this in any event presents a question of *ultra vires*, for it was not seriously contended that the contract was beyond the power of the city to make, but it is contended that the board of public works, the city's agents, did not have such power. We need not pursue this distinction further, however, since we conclude that whatever lack of power there was in the board of public works, these appellants cannot now be heard to raise such question. In the case of *St. Louis v. Davidson*, 102 Mo. 149, 14 S. W. 825, 22 Am. St. 764, the city was seeking to recover upon a contract made with Davidson purporting to give him the privilege of working the city's prisoners at so much per day. Disposing of defendant's contention of want of power in the city to make such a contract, the court said:

"Was the city entitled to recover for the work actually done by the prisoners, and not paid for by Davidson? and was the latter estopped to deny the validity of the contract? are the questions arising on this record. It will have been observed that the charter of the city while it does not permit, yet does not prohibit, the making of such a contract as the one before us, so that although the contract is *ultra vires* the corporation, yet it is not illegal, because not prohibited by the charter. This is a distinction clearly marked out by the authorities. 2 Dill. Mun. Corp. (4th ed.) sec. 936; *McDonald v. Mayor*, 68 N. Y. 23; Bigelow, Estop. (5th ed.) 685. And though a city might successfully interpose the

plea of *ultra vires* when sued upon a contract, yet it does not thence follow that a party who contracted with such city can, when sued on the contract, successfully interpose the plea of incapacity on the part of the city to make such a contract, such contract not being illegal in the sense already indicated. In instances of this kind, the plea of legal disability of the opposite contracting party is as much out of the power of a defendant to make as would be a plea of the minority of the other party in similar circumstances, something of which no one can advantage himself, except the party making it. Bigelow, Estop. (5th ed.) 465; *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 10 Sawy. 464, 22 Fed. 245, 23 Fed. 232. But, upon a yet broader ground, the defense set up in the answers cannot be maintained; the contract was not prohibited by law. The principal in that contract has derived benefits under it; he cannot retain those benefits and repudiate the source from which they spring by denying the validity of the contract in which they originated. In short, he is estopped to grasp the benefits of that contract with one eager hand, while thrusting aside its burdens with the other."

See, also, *Town of Hendersonville v. Price*, 96 N. C. 423, 2 S. E. 155; *Monticello v. Cohn*, 48 Ark. 254, 3 S. W. 30; *Mayor etc. of New York v. Sonneborn*, 113 N. Y. 423, 21 N. E. 121; *In re Worcester County*, 102 Fed. 808; 1 Abbott, Municipal Corporations, §§ 259, 260; 1 Smith, Modern Law of Municipal Corporations, § 666; *Price v. Scott*, 13 Wash. 574, 43 Pac. 634.

The contention is made in appellants' reply brief that the estoppel claimed by the city against the appellants asserting the invalidity of the bonds is not available to the city, in that it is not pleaded. Admitting, for the sake of argument, that it was necessary in this case that the pleadings on the part of the city should show the facts upon which it relied as an estoppel, we think such facts are found in the pleadings of the city. The facts found by the court, the substance of which we have stated, are all set forth in the city's pleadings. This was a sufficient pleading of the facts relied upon by the city, though it did not in so many words allege the

conclusion that such facts constituted such estoppel. The facts are what constitute the estoppel, rather than the conclusion which the pleader might draw from the facts. *Anderson v. New York Life Ins. Co.*, 34 Wash. 616, 76 Pac. 109; 2 Bates, Pleading & Practice, pp. 1581, 1583.

It is also contended that there was a misjoinder of parties defendant. Conceding that such question is here for our review, we are unable to agree with such contention. It is not seriously contended that there would have been a misjoinder of parties had Peter Costello been alive and been joined as defendant with his surety. It is settled, under our statute and decisions, that there would have been no misjoinder in that event. Rem. & Bal. Code, § 192; *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 39 Pac. 446; *Pacific Bridge Co. v. United States Fidelity & Guaranty Co.*, 33 Wash. 47, 73 Pac. 772.

It is seriously contended, however, that there cannot be a joining of an administrator as a defendant with a co-obligor of the deceased. Counsel assert in their brief that an action to establish a claim against an estate is in the nature of a special proceeding; and argue that, therefore, the liability of the co-obligor of the deceased cannot be determined in that proceeding, since the latter is to be determined in an ordinary civil action. In other words, that the liability of the estate and of the co-obligor of deceased are determinable by separate proceedings or actions of a different nature, and hence there can be no joinder of them as defendants. We do not agree with this view of our statute. A reading of the statute relating to the presentation and establishing of claims against an estate renders it plain that, upon the rejection of a claim, it is to be established, if at all, by an ordinary civil action brought and prosecuted by the claimant against the administrator, the same as against any other defendant. Rem. & Bal. Code, §§ 1479-1483. It is in no sense a special proceeding, nor is it a part of the probate proceeding; though if the issues should be made up between the parties by

proper pleadings filed in the probate cause, without objection to the manner of bringing the parties into court, as in the case of *Filley v. Murphy*, 30 Wash. 1, 70 Pac. 107, the court would have jurisdiction to try the issues. Such issues, however, would be tried by the rules governing civil actions, with the right of trial by jury preserved, as was held in that case.

It is apparent then that a suit upon a rejected claim against an administrator is nothing more or less than a civil action, governed by the same rules as a suit by the city against the surety upon these bonds would be if the administrator were not joined as defendant. The supposed difference in the procedure looking to the adjudication of the rights of the city against the estate of the deceased and the surety, clearly furnishes no ground for holding they cannot be joined as defendants in an action to establish their liability upon these bonds. Nor can we see that the fact that the law provides for payment of the judgment against the administrator in course of administration, while it may be enforced by execution against the surety, furnishes any reason for holding there was a misjoinder, as is contended by counsel. Both the administrator and surety are in no different position than as if there were judgments rendered in separate actions against them upon these bonds. The supreme court of California in *Lawrence v. Doolan*, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159, dealing with the question under a procedure very similar to our own, said:

"It has been held in some cases that the representative of a deceased obligor cannot be joined with the co-obligors in an action on a bond, on the ground that one is charged *de bonis testatoris*, and the other *de bonis propriis*, and the judgment against the one would be different from that against the other. That reason does not prevail under the practice in this state, as the court is by the code authorized to render such judgment as will give effectual relief. The statute requires that before an administrator can be sued on an obligation arising in the lifetime of the deceased, a claim should be presented; after presentation and disallowance, suit may be brought against the representative as such, but the

judgment, as against him, must be that the amount be paid in due course of administration. That does not prevent the rendering of a proper judgment against surviving co-obligors."

See, also, *Corbaley v. State ex rel. Holmes*, 81 Ind. 62.

It is further contended that the judgment is erroneous as to form, in view of § 1483 of Remington & Ballinger's Code, which provides:

"The effect of any judgment rendered against any executor or administrator shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator and the court; and the judgment shall be, that the executor or administrator pay, in due course of administration, the amount ascertained to be due, but no execution shall issue upon such judgment, nor shall it create a lien upon the property of the estate, or give the judgment creditor any priority of payment."

It is true this section seems to contemplate that the judgment should contain the direction as to the manner of its payment by the administrator. In this case the judgment was in usual form, but without any such direction. It is clear from the provisions of this section what the effect of such a judgment is and how it shall be paid by the administrator, and since in this case it is against the administrator as such, its force and effect is easily understood, though it may not contain words directing its manner of payment as provided by this section. We think, however, it is a better practice to use the words of the statute in a judgment against an administrator, and therefore direct that the judgment against the administrator be amended by inserting the words of the statute directing the manner of its payment.

We find no reversible error in the record and conclude that the judgment should be affirmed as thus modified. It is so ordered. Respondent will recover costs.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8326. Department Two. February 3, 1910.]

# THE STATE OF WASHINGTON, *Respondent*, v. J. MONTGOMERY, *Appellant*.[1]

STATUTES—TITLE AND SUBJECTS. The title "An act relating to trade marks" is sufficient to embrace penal provisions for violations of the act.

TRADE-MARKS—INFRINGEMENT—COMPLAINT—SUFFICIENCY. A complaint for the infringement of a trade-mark label is sufficient when the charging part is in the words of the statute, Rem. & Bal. Code, § 9497, and the label is identified as that of the Allied Printing Trades Council, adopted, used, and filed as required by law.

JURY—BIAS—QUALIFICATIONS—DISCRETION OF COURT. In a prosecution for the infringement of a labor union trade-mark, prejudice of a juror is not shown and it is not an abuse of discretion to overrule a challenge for cause, where the juror was not acquainted with the defendant, knew nothing of the case, and was not a member of any union, although he had been a member and was favorably inclined towards unions.

TRADE-MARKS—REGISTRATION—APPLICATION. An application for registration of trade-marks to consist of the words "Typographical Union Label" or "Allied Printing Trades Council" facsimile of each being attached, is not void as being in the alternative, but is rather an application for the registration of two labels, the law not prohibiting the registration of more than one label on one application.

SAME—REGISTRATION—EVIDENCE—CERTIFIED COPIES. Under the law making the secretary of state's attested certificate of the recording of a trade-mark proof of its adoption, and prescribing no form for the certificate, the secretary of state's certified copy of the application and label is sufficient prima facie proof of all acts necessary for registration, including the filing of two copies of the label required by law.

SAME—REGISTRATION—APPLICATION. The law does not require application for the registration of a trade-mark to be made by any particular person, and it is sufficient that one application for two labor union labels, having some interests in common, was made by the president of one of the unions in the interest and for the use of the unions.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 13, 1909, upon a trial

[1]Reported in 106 Pac. 771.

and conviction of the violation of a statute relating to trademarks. Affirmed.

*Million & Houser* and *George Friend*, for appellant.

PARKER, J.—The defendant was convicted of a misdemeanor under the act of 1897, Laws of 1897, pp. 65-69, entitled "An act relating to trade marks." Rem. & Bal. Code, § 9492 *et seq.* The complaint charges the defendant as follows:

"Then and there being the said J. Montgomery, in the county of King, state of Washington, on the 29th day of August, A. D. 1908, did then and there wilfully and unlawfully use the genuine label of Allied Printing Trades Council, an association or union of workingmen without being authorized so to do by said Allied Printing Trades Council, the label so used having been theretofore duly adopted and used by said Allied Printing Trades Council and filed, as provided by law, in the office of the secretary of state of the state of Washington, for the purpose of designating and distinguishing all goods, wares, and merchandise manufactured and put out by said Allied Printing Trades Council and its members, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington."

The portions of the law with which we are here concerned are as follows:

"Sec. 3. Every such person, association or union, that has heretofore adopted or used, or shall hereafter adopt or use, a label, trade mark, term, design, device or form of advertisement, as provided in section one of this act, may file the same for record in the office of the secretary of state by leaving two copies, counterparts or facsimiles thereof, with said secretary, and by filing therewith a sworn application specifying the name or names of the person, association or union on whose behalf such label, trade mark, term, design, device or form of advertisement shall be filed, the class of merchandise and a description of the goods to which it has been, or is intended to be appropriated, stating that the

party so filing or on whose behalf such label, trade mark, term, design, device or form of advertisement shall be filed, has the right to the use of the same, that no other person, firm, association, union or corporation has the right to such use either in the identical form or in any such near resemblance thereto as may be calculated to deceive, and that the facsimile or counterparts filed therewith are true and correct. There shall be paid, for such filing and recording, a fee of two dollars. Said secretary shall deliver to such person, association or union so filing or causing to be filed any such label, trade mark, term, design, device, or form of advertisement, so many duly attested certificates of the recording of the same as such person, association or union may apply for, for each of which certificates said secretary shall receive a fee of one dollar. Any such certificate of record shall, in all suits and prosecutions under this act, be sufficient proof of the adoption of such label, trade mark, term, design, device or form of advertisement. . . ." Rem. & Bal. Code, § 9494.

"Sec. 6. Every person who shall use or display the genuine label, trade mark, term, design, device or form of advertisement of any such person, association or union, in any manner, not being authorized so to do by such person, union or association, shall be deemed guilty of a misdemeanor. . . ." Rem. & Bal. Code, § 9497.

It is contended by learned counsel for appellant that the title of the act is insufficient to include the criminal features in the body thereof, and that the act is therefore invalid, in so far as it provides for criminal liability for the violation of its terms. It seems to us that this contention has been disposed of by the former decisions of this court. In *State v. Ames*, 47 Wash. 328, 92 Pac. 137, a similar contention was made against the penal provisions of an act entitled, "An act to establish pilot regulations for the Straits of Juan de Fuca, Puget Sound, and all American waters pertaining thereto." And in *State v. Merchant*, 48 Wash. 69, 92 Pac. 890, an act entitled, "An act to protect stockholders and persons dealing with corporations in this state," was assailed upon the same ground. It was held in both of these

cases that the titles were sufficient to include penal provisions in the body of the acts. Some effort is made to distinguish between the titles there considered and the title to this act, on the ground that this title is less suggestive of penal provisions in the body of the act than are those titles. None of these titles refer in terms to any penal provision in the body of the acts, nor do we think it necessary that they should do so in order to support such provisions. In *State v. Merchant*, at page 72, Chief Justice Hadley, speaking for the court, said: "The constitutional provision is not necessarily violated by a mere failure to state in the title of an act that the act itself carries a penalty," referring to the constitutional provision that, "No bill shall embrace more than one subject and that shall be expressed in the title." It is not contended that the other provisions of the act are without the scope of its title, and since the penal provisions furnish a lawful and appropriate means of protecting the rights secured by the act, we think the title is sufficient to include such provisions.

It is next contended that the complaint is insufficient, in that it does not state in what particular manner the label was used, and, also, in that it does not describe the label. It will be noticed that the charging part of the complaint is in almost the exact words of the penal provision of § 6 of the act, and that the label is described, or rather identified, as being the label of the Allied Printing Trades Council, adopted, used and filed as provided by law. We think this is sufficient. *State v. Ryan*, 34 Wash. 597, 76 Pac. 90; *State v. Bogardus*, 36 Wash. 297, 78 Pac. 942; *State v. Smith*, 40 Wash. 615, 82 Pac. 918; *State v. Lewis*, 42 Wash. 672, 85 Pac. 668; *State v. Davis*, 43 Wash. 116, 86 Pac. 201.

Counsel for appellant challenged the juror Lee for cause, and upon the court's denial of the challenge, assigns error. Upon the examination of the juror, it was shown that he was not acquainted with the defendant and knew nothing about the case, that he had been a member of a union but was

not now, and had not been since 1895, that he was very much in favor of the unions though not a member. While his somewhat extended examination showed his favorable inclinations toward the unions was quite pronounced, it did not show any prejudice against the defendant or any opinion upon the question of the defendant's guilt or innocence. Upon such a showing it became largely a matter of discretion with the trial court in the disposition of the challenge, and we are unable to see that there was any abuse of such discretion in the court's holding that the juror was qualified.

It is further contended that the court erred in admitting in evidence a certified copy, made by the secretary of state, of the application for registration of the label in question. It appears from this certified copy that the application was made and sworn to by the president of the International Typographical Union of North America. It was filed and recorded in the office of the secretary of state September 27, 1906, and was introduced in evidence in this case for the purpose of showing registration of the label under this law. It is urged against the admission of this document in evidence that it shows an application for registration of two different labels in the alternative, and does not show which one is intended to be registered. The application states:

"The label, mark, brand, stamp, device, design or form of advertisement sought to be registered, consist of an imprint containing the words 'Typographical Union Label,' or containing the words 'Allied Printing Trades Council,' together with name of city or town in which is located the local union or subordinate body using said label. A facsimile of said label, mark, brand, stamp, device, design or form of advertisement is as follows:

"For Typographical Union Label. (Facsimile attached)

"For Allied Printing Trades Council Label. (Facsimile attached)"

We are unable to agree with this contention, but it seems to us the application shows an intention to register both

labels, and there does not appear to be anything in the law prohibiting the registration of more than one label by one application.

It is also contended that it does not appear from this application and certificate of the secretary of state that two copies of the label in question were filed as the law requires. A copy of the label in question is embodied in and made part of this application. It is true there is nothing in the copy of the application or certificate of the secretary of state thereto, here offered in evidence, stating in terms that two copies of the label were filed. It will be noticed, however, that the law provides that the secretary of state shall make duly attested certificates of the recording at the instance of persons interested, and that such certificates shall "In all suits and prosecutions under this act be sufficient proof of the adoption of such label. . . . " The law does not provide any form for the certificate to be made by the secretary of state; it would therefore seem that a certified copy of the application with a copy of the label embodied therein, showing the filing and recording thereof, is an appropriate manner of certifying such recording, to be used in evidence as the law provides. The fact that the secretary received and filed the application, we think is sufficient *prima facie* proof that all necessary acts, including the filing of the necessary copies of the label, were performed entitling the label to registration.

It is also urged against the admission of this certified copy that the application for registration was not made by the Allied Printing Trades Council. It is true the application appears to have been verified by the president of the International Typographical Union of North America. The application discloses the fact, however, that these two associations have some interests in common, and that the label in question was registered for the use of the "Allied Printing Trades Council." There appears to be nothing in the law requiring the registration or the verification of the ap-

plication to be made by any particular person. We think it is sufficient if it is apparent upon the face of the application that it is made in the interest and for the use of some person or association therein designated. We think the certified copy of the application, showing its filing and recording in the office of the secretary of state, was admissible in evidence as *prima facie* proof of the adoption and recording of the label in question.

As to other contentions briefly suggested by counsel for appellant, we find no prejudicial error therein, and do not feel called upon to discuss them. We are of the opinion that the judgment should be affirmed. It is so ordered.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

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[No. 8593. Department Two. February 3, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN E. PRAUL, *Appellant*.[1]

MINES AND MINERALS — "VEINS" — DISCOVERY — EVIDENCE — SUFFICIENCY. There is sufficient evidence of the discovery of a vein of ore (understood by miners to be a body of mineral-bearing substance bounded on each side by the country rock, of varying width and length) where a miner testified that the deposit of ore was what he called a moraine ledge, and explained that the ledge was in permanent place but had been moved or shoved down with the whole country; since there appeared to be a well-defined ledge kept in place by country rock, even if the whole mountain had been moved to one side by some force of nature.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered November 22, 1909, upon a trial and conviction for trespass on unenclosed lands. Affirmed.

*Lewis J. Nelson*, *Fred H. Peterson*, and *Philip D. Macbride*, for appellant, contended that the mineral discovered

[1]Reported in 106 Pac. 763.

was float rock. Lake, Prospecting for Gold and Silver, page 17; Costigan, Mining Law, page 105. The mineral was not within well-defined boundaries and it was not a lode or vein. *Burke v. McDonald*, 2 Idaho 679, 33 Pac. 49; *Foote v. National Min. Co.*, 2 Mont. 402; *Leadville Co. v. Fitzgerald*, Fed. Case. No. 8,158; *Tabor v. Dexler*, Fed. Case, No. 13,723; *Consolidated Wyoming Gold Mining Co. v. Champion Min. Co.*, 63 Fed. 540, 544; *Book v. Justice Min. Co.*, 58 Fed. 106, 120, 121; *Waterloo Min. Co. v. Doe*, 56 Fed. 685, 689. A lode or ledge discovery must initiate the location. *Wolfley v. Lebanon Min. Co.*, 4 Colo. 112; *Burke v. McDonald, supra; Sullivan v. Leer*, 2 Colo. App. 141, 29 Pac. 817.

*Fred Kemp* and *Ludington & Kemp*, for respondent, contended that there was a ledge, vein, or deposit. *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 69 S. W. 572, 91 Am. St. 87; *Blue Bird Min. Co. v. Largey*, 49 Fed. 289; *Cheesman v. Shreeve*, 40 Fed. 787; *Hayes v. Lavagnino*, 17 Utah 185, 53 Pac. 1029; *Wheeler v. Smith*, 5 Wash. 704, 32 Pac. 784; *United States v. Iron Silver Min. Co.*, 128 U. S. 673. By "rock in place" is not meant merely hard rock or quartz. *Stevens v. Williams*, Fed. Case, No. 13,413; 1 Morrison, Mining Reports, 566; *Jones v. Prospect Mountain Tunnel Co.*, 21 Nev. 339, 31 Pac. 642. It is sufficient that the mineralized substance lies within any other well-defined bodies. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, 29 Utah 490, 83 Pac. 648; *Cheesman v. Shreeve, supra*. The locator was entitled to hold, as against trespassers. *Cedar Canyon Cons. Min. Co. v. Yarwood*, 27 Wash. 271, 67 Pac. 749, 91 Am. St. 841; *Clipper Min. Co. v. Eli Min. & Land Co.*, 194 U. S. 220.

DUNBAR, J.—This was an action commenced in the justice court against the appellant for trespass on unenclosed lands, under Rem. & Bal. Code, § 2823, and taken to the superior court on appeal by appellant. A trial was had in the superior

court on April 21, 1909, the court sitting with a jury, and evidence was introduced for the state for the purpose of proving that the land trespassed upon was a mining location in Chelan county made by J. E. Shore and Dan Ryan, which attempted location was called the "Pride of the West." At the conclusion of the plaintiff's testimony, the defendant moved for a dismissal of the action on the ground that the testimony did not show that any valid location of the ground entered upon and occupied had been made. This motion was overruled by the court. Evidence was produced by the defense and, at the conclusion of the testimony, under instructions of the court, the jury returned a verdict of guilty. Judgment was entered and appeal taken.

The appellant's assignments are that the court erred in denying the motion for dismissal, and overruling the defendant's motion for a new trial. These assignments involve the contention that the so-called Pride of the West mining claim was not shown under the testimony to be a valid mining location, and that the lode claimants, Messrs. Shore and Davis (Ryan's successors in interest), therefore had no possessory right to the land, and that, therefore, no trespass was committed by the appellant. Conceding the statement of the appellant and the authorities cited by him, to the effect that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located; that veins are collections of mineral matter often closely related to, but differing more or less in character from, the inclosing country rock, usually in fissures formed in those rocks after the rocks had more or less consolidated; and that a vein, as the term is used in the mining law, is a body of mineral-bearing rock, within defined boundaries in the general mass of the mountain, we think there was sufficient testimony in this case to refute the appellant's contention that there was no vein or ledge within the meaning of the law, and that there was no rock in place shown.

A very clear and comprehensive definition of a vein was

given in *King v. Amy & Silversmith Con. Min. Co.*, 9 Mont. 543, 24 Pac. 200, to the effect that a vein to the miner is a body of ore, quartz, or mineral-bearing substance lying within the crust of the earth, bounded on each side by the country rock, greatly varying in width, and extending in length across and through the country for greater and less distances. It is true that one of the principal witnesses for the respondent, Mr. Dan Ryan, who was the locator, testified that the condition of the earth at the location of this place showed what he said he would call a kind of moraine ledge. But while he called it a moraine ledge, the description that he gave of the condition showed that he did not understand the exact meaning of the word moraine, which in reality is not a legal but a geological word. He had some slight conception of the meaning of moraine, and concluded this was a moraine because the ground or mountain had been moved. But the condition that he described showed that it was actually a ledge with rock in place. After stating that it was what he called a kind of a moraine ledge, he continued by saying: "The mountain has been shoved and of course it is not in place, but the ledge is there all the same. The deposit of ore extends up to the surface, but this one has been shoved down." Further on he gave a description of the condition as follows:

"Q. What do you mean by moraine ledge? A. Well, ground that has been shoved off. There may be a thousand feet or two thousand or a hundred feet. But the ledge has been in its permanent place, only has been shoved off from the vein. I call it a broken ledge. The whole country has been moved. Q. Not just alone that ledge, but the whole country has been moved? A. Yes."

If there is a well-defined ledge there kept in place by country rock, which the witness testified it had been, it would still be a ledge with rock in place, even though the whole mountain had been shoved to one side by some force of nature; and this was the condition that was proven there,

if the jury believed the testimony of the witnesses for the state. There was a contradiction in the testimony, but with that we have no concern. The jury was properly instructed by the court, and no exceptions have been taken to the instructions. It was shown that all the other requirements had been met. The jury determined the main point in controversy, and the judgment will therefore be affirmed.

RUDKIN, C. J., CROW, PARKER, and MOUNT, JJ., concur.

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[No. 8612. Department One. February 3, 1910.]

THE STATE OF WASHINGTON, *on the Relation of Godfrey Chealander, Appellant*, v. HARRY W. CARROLL, *Comptroller and Ex-Officio Clerk of the City of Seattle, Respondent.*[1]

ELECTIONS — CANDIDATE — ELIGIBILITY — POWERS OF COMPTROLLER. Under a charter limiting the right to file declarations of candidacy to those persons "who shall be eligible" for the office sought, the city comptroller has power to inquire into the eligibility of candidates and refuse to certify the same if ineligible, although no statute or charter provision expressly authorizes such inquiry.

MUNICIPAL CORPORATIONS—OFFICERS—DISQUALIFICATIONS. Under a charter disqualifying any person appointed to the office of civil service commissioner from holding any other office during the term for which he was appointed, a person appointed to the office at a time when he was disqualified to act as commissioner, who accepted the office and continued to hold it after his disqualification was removed, cannot claim that he was not "appointed" to the office or a *de jure* officer; as the appointment is a continuing one, and he is disqualified from holding any other office during the term for which he was appointed.

OFFICERS—DISQUALIFICATIONS—OFFICIAL BONDS—FAILING TO GIVE —EFFECT. The failure of an officer to give a bond, which was a ministerial act for the security of the government and not a condition precedent to his authority to act, does not render him merely a *de facto* officer, but he is a *de jure* officer under a defeasible title, and subject to the disqualification of holding other offices attached to the office.

[1]Reported in 106 Pac. 748.

Appeal from a judgment of the superior court for King county, Yakey, J., entered January 31, 1910, after a hearing before the court, dismissing proceedings in mandamus to compel a city comptroller to place the name of a candidate upon the official ballot for nomination for the office of city councilman. Affirmed.

*Robert C. Saunders* and *Israel Nelson*, for relator.

*Scott Calhoun*, for respondent.

FULLERTON, J.—On December 10, 1909, the relator, Godfrey Chealander, filed in the office of the city comptroller of the city of Seattle a written declaration of candidacy, in accordance with the direct primary law, in which he declared himself a candidate for nomination to the office of member of the city council of the city of Seattle for the Tenth ward thereof, to be made at the primary election to be held on February 8, 1910, and requested that his name be printed on the official primary ballot as a candidate of the republican party for that office. The application was regular and sufficient on its face and was accompanied with the statutory fee required of candidates for the office named. The city comptroller, whose duty it is to certify the nominations and direct the printing of the official ballots, refused to recognize the relator as a candidate for the office sought by him, and ordered and directed that, in making up and printing the official ballot, the relator's name be not included thereon, giving as his reason therefor that the relator was not eligible to the office to which he aspired. The relator, on learning of this action of the comptroller, began mandamus proceedings in the superior court of King county to compel the comptroller to recognize him as a candidate and to place his name on the ballot.

In response to the writ, the comptroller appeared, whereupon the following facts were stipulated as constituting the grounds for the comptroller's action, viz: That the relator was on the —— day of ——, 1908, appointed to the

office of civil service commissioner in and for the city of Seattle, for the term ending December 31, 1910; that he did not then, nor thereafter, give and file the bond required by the city charter before entering upon the duties of such office, but did, within ten days after his appointment, enter upon such duties and did perform the same from such time until on or about December 1, 1909, when he resigned the office and his resignation was accepted; that the relator became a resident of the city of Seattle in the month of August, 1905, and was never a resident thereof before such time. That the city charter of the city of Seattle provides that all elective and appointive officers of the city shall be citizens of the United States and of the city of Seattle and electors therein, and shall have been residents of the city of Seattle for at least four years prior to the time of their election or appointment, and that "no person elected or appointed to" the office of civil service commissioner of the city "and who has accepted the said office and entered upon the duties thereof, shall . . . be eligible to any other office in the city during the term for which he was so elected or appointed." On the hearing the trial judge ruled that the relator was not entitled to the writ sought, and ordered the proceedings dismissed. The relator prosecutes this appeal.

It is the relator's first contention that the city comptroller is without warrant to inquire into his eligibility for office; that neither the city charter not the general law confers upon the comptroller that power, and that in consequence when he filed with the comptroller a declaration of candidacy in due form, accompanied with the statutory fee, the comptroller had no other duty than to certify his name as one entitled to be printed on the official ballot; and, he argues, that since the comptroller had no authority to inquire into his eligibility, the courts likewise have no authority to make the inquiry, and will compel the comptroller to properly certify his candidacy so that his name may appear on such official ballot.

It is true there is no statute or charter provision of the city of Seattle directing and authorizing the city comptroller to inquire into the eligibility of candidates for office who file the statutory declaration with him, and he would perhaps be guilty of no dereliction of duty if he directed the printing of the names of all such persons on the ballot, but we do not think it follows therefrom that he is precluded from making the inquiry in all cases. The primary law by express terms limits the right to file declarations of candidacy to those persons only "who shall be eligible" to the office sought. This, while it may not require inquiry on the comptroller's part into the eligibility of candidates, plainly suggests such inquiry, and, when it is remembered that the comptroller has duties to perform in relation to the expenditure of public moneys, indicates that the comptroller has sufficient discretion to compel a candidate whose eligibility is doubtful to resort to his proofs. The argument that this puts too much power into the hands of a ministerial officer is not conclusive. True, the power may be abused by that officer, but so may the filing of declarations of candidacy be abused. Let us suppose that the women of the relator's ward should become convinced that they were eligible to the office of member of the city council of the city of Seattle, and should tender to the comptroller their declarations of candidacy; must the comptroller file the declarations and place the declarants' names upon the official ballot? He would know that the very charter under which he acts and under which the declarants sought election declared them ineligible. He would know also that his duties as comptroller require him to conserve the expenditures of the public money; yet, if the relator's theory be correct, he must, without questioning their rights, certify such declarants as candidates and publish their names upon the election ballots. The law does not require the doing of vain and useless things, even when the doing of them incurs no greater hardship than the mere time and labor expended

in the doing of the things. But where, as here, the thing involves the useless expenditure of public money, the rule has almost the form of a mandate. This view of the law works no hardship upon the candidate. If the comptroller rules incorrectly, the means for correcting him are open and can be made available without loss of right on the part of the candidate.

The authorities cited by the relator seem to us not to support his contention in its entirety. The case principally relied upon is *People ex rel. Eaton v. District Court*, 18 Colo. 26, 31 Pac. 339. In that case two sets of nominations, both by conventions purporting to have been held by the same political party, each in apparent conformity to law, were certified to the secretary of state for filing. Protests against the regularity of the one convention by the other were made to the secretary and he decided between them. The defeated contestants thereupon brought a proceeding in mandate to compel their recognition as the regular party nominees. The court decided that neither the secretary nor the courts had power to determine which of the contestants had the better right, and compelled the secretary to certify to both sets of nominees. The contest in this case, it will be observed, was over the right to the party name. It involved no question of eligibility on the part of the several nominees, but merely which of two several sets of nominees were entitled to call themselves by the name of the party each purported to represent. This presents no question which directly affects the state, and since the law did not impose the duty of deciding upon the secretary, the courts might well hold that he had no such power. But the case at bar presents a question in which the state is interested. The relator is seeking to compel the state to recognize him as a candidate for a particular office when, if the comptroller be correct, he is not eligible to that office and cannot become a *de jure* officer if elected. These principles, it would seem, sufficiently distinguish the cases.

Cases more nearly in point and supporting the comptroller can, we believe, be found in our own state. The legislature has required for the due organization of corporations that their articles be filed with the secretary of state. It has also provided against the assumption by one corporation of the name of another existing corporation; has provided for the organization of a certain class of corporations under a distinctive name, and forbidden others not of that class to adopt the distinctive name; and has provided against the adoption by corporations of certain functions not belonging to corporations of its class. The secretary of state has assumed to inquire, when articles of incorporation have been presented to him for filing, whether the articles violated any of these several prohibitions. It is agreed that no express authority to make the inquiry has been conferred upon him by law, but this court has uniformly upheld his right to make the inquiry. Where he has determined against the right so to file, we have inquired into the soundness of his holding and have refused to run a mandate against him in all cases when his objection has appeared to us to be just. *State ex rel. Osborne, Tremper & Co. v. Nichols*, 38 Wash. 309, 80 Pac. 462; *State ex rel. Gorman v. Nichols*, 40 Wash. 437, 82 Pac. 741; *State ex rel. Amalgamated Republic Mines Co. v. Nichols*, 47 Wash. 117, 91 Pac. 632; *State ex rel. Baker River and Shuiksan R. Co. v. Nichols*, 51 Wash. 619, 99 Pac. 876. While the ground for these decisions is stated to be that the courts will not require the secretary to do vain and useless acts, it must be conceded that, in their last analysis, they rest on the ground that the secretary is vested with discretion to determine whether the articles tendered comply with the law.

The relator further contends that he is in fact eligible to the office which he seeks. From the recitals of fact we have heretofore made it will be known that the comptroller based his conclusion of ineligibility on the fact that the charter of the city of Seattle provides that no person appointed to

the office of civil service commissioner of the city of Seattle and who accepts the same shall be eligible to any other office in the city during the term for which he was so appointed, and that the relator was appointed to and accepted this office for a term ending December 31, 1910. The relator admits that he was so appointed to the office named and performed the duties thereof until a day certain when he resigned, but contends that he cannot be said to have been legally appointed or to have legally accepted the office, because of the fact that he was ineligible to the appointment at the time it was made, as he had not then been a resident of the city of Seattle for four years next previous to his appointment, and the further fact that he did not file the bond by law required of him before entering upon the duties of the office. But these contentions are not tenable. Aside from the fact that the law never looks with favor upon a claimant who must rely upon a past dereliction in order to maintain a present right, the deduction itself is not sound. An appointment to an office is continuing in its nature; that is to say, it is in the nature of an offer, and is good until it is expressly or impliedly withdrawn. Hence, in this case, even though the relator were not qualified to accept the office tendered him when first made, he accepted it as far as he was able, and continued in the performance of its duties until after his disqualification was removed. If, therefore, the appointment did not legally take effect when first made and accepted, it became legally effective when relator continued in the performance of the duties of the office after his disqualification was removed.

So, also, the failure to give a bond does not render an officer duly elected or appointed a *de facto* officer. He is a *de jure* officer holding by a defeasible title. *Foot v. Stiles*, 57 N. Y. 399. The giving of a bond is a mere ministerial act for the security of the government, and not a condition precedent to the officer's authority to act, unless especially made so by statute. *Glavey v. United States*, 182 U. S.

595. The courts generally hold that, even though the statute expressly provides that, upon a failure to give a bond within the time prescribed, the office shall be deemed vacant and may be filled by appointment, the default is a ground for forfeiture only, not forfeiture *ipso facto*, and that if, notwithstanding such default, the state or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured, and it is a title *de jure* having relation back to the time of his election or appointment. *People ex rel. Bennett v. Benfield*, 80 Mich. 265, 45 N. W. 135. On any view of the case, therefore, the relator was an officer *de jure* under his appointment as a civil service commissioner, and is disqualified from accepting or holding any other office during the term for which he was appointed. It follows that he was disqualified for the office of member of the city council of the city of Seattle, and that the judgment of the trial court should be affirmed. It is so ordered.

RUDKIN, C. J., and MORRIS, J., concur.

CHADWICK, J. (concurring)—I concur in the result but not with all of the reasoning of Judge Fullerton. He says:

"While the ground for these decisions is stated to be that the courts will not require the secretary to do vain and useless acts, it must be conceded that, in their last analysis, they rest on the ground that the secretary is vested with discretion to determine whether the articles tendered comply with the law."

With this I cannot agree, and at the risk of being charged with a disposition to be hypercritical, I shall briefly state my views.

If a solution of the present problem required us to hold that the comptroller had an absolute discretion in filing or refusing to file a declaration of candidacy which is sufficient in form, I would not concur in the result in this case. While it may seem that he has, or that the secretary of state had

in the cases cited, it is not so. The officer may arbitrarily refuse. If a party conceives himself to be aggrieved, he may seek his remedy, and the officer becomes only a nominal factor in the case. The remedy is allowed not on the theory that the officer has or has not a discretion, but because our statute has so modified the common law procedure of mandamus that it has become a hearing upon the merits and not upon a technical question of statutory duty. In *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, this court said, in speaking of the statutory mandamus:

"Formerly mandamus was regarded as a prerogative writ, issued not as of right, but at the pleasure of the sovereign, or state, in his or its name, as an attribute of sovereignty, but with us the writ is not in any sense a prerogative writ, or a writ to be issued at the discretion of the court. It is a procedure under the Code, and any person who has a cause that calls for its invocation has the same right to sue out the writ as he has to commence a civil action to redress a private wrong. As we said in *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50, a proceeding in mandamus, 'is a judicial investigation, the object of which is the determination of civil rights, the same as in any ordinary proceeding; not only the determination of rights, but their determination in such a way as to culminate in an effective judgment.' In our practice, mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The procedure has in it all the elements of a civil action. The facts stated in the affidavit for the writ may be controverted by a return, raising both questions of law and fact. The return likewise may be controverted, and a trial had on the issues of fact thus raised, either before the court, a jury, or a referee, as the court may order. Judgment can be entered on the verdict or findings not only directing the issuance of a peremptory mandate, but for damages and costs on which execution may issue. The statute has been so framed as to afford complete relief in all cases falling within its scope and purport, whether these be cases of wilful violations of recognized rights, or denials, made in good faith, that the rights contended for exist."

In all of the cases cited in the majority opinion this court has inquired into, and made its decision rest upon, some fact, so that, in the last analysis, the right to refuse a filing for noncompliance with some form or requirement of the law or the right to pass upon the eligibility of a candidate does not rest in the discretion of the officer, but is determined as a question of fact and law by the court under the civil action which, for the want of a better term, we have called "mandamus." The intent of our special proceeding (Laws 1895, ch. 65; Rem. & Bal. Code, § 999 *et seq.*), was to make mandamus a real remedy and afford final relief without resort to its adjutant at common law—injunction. Its provisions are sufficiently set out in the quotation which we have made from the case of *State ex rel. Brown v. McQuade, supra.* So, in this case, the writ is refused, not because the comptroller has discretion to determine the fact, but because he has refused to perform a duty, and we have gone beyond the record as he had it before him and weighed the facts upon which the relator rests his claim, and found them wanting in legal worth. It is unnecessary to discuss the function of the common law writ, and the modifications made by our statute. These are subjects which may be pursued at the leisure of those interested therein.

GOSE, J., concurs with CHADWICK, J.

[No. 8317. Department One. February 4, 1910.]

# WALTER E. SHORE, *Appellant*, v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY, *Respondent*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—KNOWN DANGERS—EVIDENCE—SUFFICIENCY. A member of a gang on a tower car putting up a trolly wire, who admitted that he was familiar with the work and appreciated all the dangers, assumes the risks and a nonsuit is proper, where it appears that in the hurry to get out of the way of a passenger train, two mast arms were skipped, leaving three hundred feet of wire hanging from the spool, which was liable to slip at any time, that it slipped, causing plaintiff to lose his balance and involuntarily seize a live wire about three feet distant, which severely burned the plaintiff when the other wire sagged to the ground.

SAME—CAUSE OF ACCIDENT. In such a case it is immaterial whether or not the foreman negligently directed the man at the brake on the spool to slack the wire, where the uncontradicted testimony showed that any such order, if given, was not obeyed.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 19, 1908, upon granting a nonsuit at the close of plaintiff's case, dismissing an action for personal injuries sustained by an employee engaged in putting up a trolley wire. Affirmed.

*Samuel R. Stern*, for appellant, cited: *Cumberland Telephone & Telegraph Co. v. Graves' Adm'x*, 31 Ky. Law 972, 104 S. W. 356; *Burns v. Delaware & Attell Telegraph & Telephone Co.*, 70 N. J. L. 745, 59 Atl. 220, 592, 67 L. R. A. 956; *Drown v. New England Telephone & Telegraph Co. etc.*, 81 Vt. 358, 70 Atl. 599; *Co-Operant Tel. Co. v. St. Clair*, 168 Fed. 645; *Hausler v. Commonwealth Elec. Co.*, 240 Ill. 201, 88 N. E. 561; *Zentner v. Oshkosh Gas Light Co.*, 126 Wis. 196, 105 N. W. 911; *Martin v. Des Moines Edison Light Co.*, 131 Iowa 724, 106 N. W. 359; *Western Union Tel. Co. v. McMullen*, 58 N. J. L. 155, 33 Atl. 384, 32 L. R. A. 351, and note; *Choctaw etc. R. Co. v. Jones*,

[1]Reported in 106 Pac. 753.

77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837; *Myhan v. Louisiana Elec. Light & Power Co.*, 41 La. Ann. 964, 6 South. 799, 17 Am. St. 436, 7 L. R. A. 172; *Passage v. Stimson Mill Co.*, 52 Wash. 661, 101 Pac. 239; *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765; *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400; *Jackson v. Danaher Lumber Co.*, 53 Wash. 596, 102 Pac. 416; *Shannon v. Consolidated Tiger & Poorman Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Nelson v. Willey S. S. & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *Eidner v. Three Lakes Lumber Co.*, 45 Wash. 323, 88 Pac. 326; *Larsen v. Covington Lumber Co.*, 53 Wash. 146, 101 Pac. 717; *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888; *Harris v. Washington Portland Cement Co.*, 49 Wash. 345, 95 Pac. 84; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191. The negligence of the foreman entitled the plaintiff to recover. *Newcomb v. Puget Sound and Queen City Boiler Works*, 54 Wash. 419, 103 Pac. 456; *Sanquist v. Independent Telephone Co.*, 38 Wash. 313, 80 Pac. 539; *Williams v. Ballard Lumber Co.*, 41 Wash. 338, 83 Pac. 323; *Howland v. Standard Milling & Logging Co.*, 50 Wash. 34, 96 Pac. 686; *Cook v. Chehalis River Lumber Co.*, 48 Wash. 619, 94 Pac. 189; *Duskey v. Green Lake Shingle Co.*, 51 Wash. 145, 98 Pac. 99; *LaBee v. Sultan Logging Co.*, 51 Wash. 81, 97 Pac. 1104; *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900; Joyce, Electrical Law, § 665; Thompson, Negligence, § 4630; Thompson, Electricity, §§ 89-92, 93; *Ball v. Megrath*, 43 Wash. 107, 86 Pac. 382; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 546, 82 Pac. 114; *Woodson v. Prescott* (Ark.), 121 S. W. 273; *Barto v. Iowa Tel. Co.*, 126 Iowa 241, 101 N. W. 876, 106 Am. St. 347.

*Graves, Kizer & Graves*, for respondent, in addition to citing Washington cases, contended, *inter alia*, that the servant assumes the risks which are as well known to him as to the master, and when both are equally competent to judge.

*Thayer v. St. Louis etc. R. Co.*, 22 Ind. 26, 85 Am. Dec. 409; *Olson v. McMullen*, 34 Minn. 94; *Malone v. Hawley*, 46 Cal. 409; *Weeklund v. Southern Oregon R. Co.*, 20 Ore. 591, 27 Pac. 260; *Gulf etc. R. Co. v. Jackson*, 65 Fed. 48; *Johnson v. Oakes*, 70 Fed. 566; *Jenney Elec. Light & Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Salem Bedford Stone Co. v. Hobbs*, 11 Ind. App. 27; *Morbach v. Home Min. Co.*, 53 Kan. 731, 37 Pac. 122; *Carey v. Boston & M. R. R. Co.*, 158 Mass. 228, 33 N. E. 512; *Davis v. Detroit etc. R. Co.*, 20 Mich. 105, 4 Am. Rep. 364; *Watson v. Kansas & T. Coal Co.*, 52 Mo. App. 366; *Thorn v. New York City Ice Co.*, 46 Hun 497; *Nashville etc. R. Co. v. Handman*, 81 Tenn. 423; *Galveston etc. R. Co. v. Lempe*, 59 Tex. 19; *Bonnet v. Galveston etc. R. Co.* (Tex. Civ. App.), 31 S. W. 525; *Thompson v. Chicago etc. R. Co.*, 14 Fed. 564; *Rietman v. Stolte*, 120 Ind. 314, 22 N. E. 304; *Carlson v. Sioux Falls Water Co.*, 5 S. D. 402; *Hazlehurst v. Brunswick Lumber Co.*, 94 Ga. 535, 19 S. E. 756; *Stobba v. Fitzsimmons & Connell Co.*, 58 Ill. App. 427; *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956; *Wormell v. Maine Cent. R. Co.*, 79 Me. 397, 10 Atl. 49, 1 Am. St. 321; *Claybaugh v. Kansas City etc. R. Co.*, 56 Mo. App. 630; *Brown v. Oregon Lumber Co.*, 24 Ore. 315, 33 Pac. 557. A servant's opportunity to acquire knowledge is the legal equivalent of actual knowledge. *Motey v. Pickle Marble & Granite Co.*, 74 Fed. 155; *Thompson's Adm'r v. Chicago, M. & St. P. R. Co.*, 18 Fed. 239; *St. Louis, Iron Mountain & Southern R. Co. v. Higgins*, 53 Ark. 458; *Chicago etc. R. Co. v. Simmons*, 11 Ill. App. 147; *Taylor v. Carew Mfg. Co.*, 140 Mass. 150, 3 N. E. 21; *McDugan v. New York Cent. etc. R. Co.*, 10 Misc. Rep. 336, 31 N. Y. Supp. 135; *Watson v. Houston etc. R. Co.*, 58 Tex. 434; *Haley v. Jump River Lumber Co.*, 81 Wis. 412, 51 N. W. 321, 956. Recovery cannot be had where the dangers are patent to common observation and should have been seen by the employee had he exercised ordinary prudence. *Linton Coal & Mining Co. v. Persons*, 15

Ind. App. 69; *Lumley v. Caswell*, 47 Iowa 159; *Brossman v. Lehigh Val. R. Co.*, 113 Pa. St. 490, 6 Atl. 226, 57 Am. Rep. 479; *Austin v. Boston & M. R. Co.*, 164 Mass. 282, 41 N. E. 288; *McGrath v. Walsh*, 4 N. Y. Supp. 705; *Gulf etc. R. Co. v. Hohl* (Tex.), 29 S. W. 1131; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; *Langlois v. Maine Cent. R. Co.*, 84 Me. 161, 24 Atl. 804; *Pingree v. Leyland*, 135 Mass. 398; *Bengston v. Chicago, St. P. & M. R. Co.*, 47 Minn. 486, 50 N. W. 531.

RUDKIN, C. J.,—This action was instituted to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant. The court granted a nonsuit at the close of the plaintiff's testimony, and from the judgment of nonsuit, this appeal is prosecuted.

The following statement will sufficiently disclose the nature of the work in which the appellant was engaged, and the manner in which the injury was inflicted. At the time of receiving the injury complained of, the appellant was engaged with other employees of the respondent in constructing the overhead trolly system for the electric railroad owned and operated by the respondent. The poles which supported the wires stood at one side of the road, with iron arms, called mast arms, projecting from the poles over the track, to which the wires were fastened. A messenger wire was first attached to the mast arm, and a few inches below this depended the trolly wire, which was fastened to the messenger wire by iron clasps. In stringing the wires a tower of sufficient height to bring the workmen in proper working proximity to the mast arm was constructed on one end of a flat car, and the spools containing the messenger and trolly wires were placed at the other end, near the floor of the car, with an iron rod or bar through the holes in the spools so as to permit the spools to revolve. Each of these spools would weigh close to a ton when filled with wire. A couple of reels were placed at or near the top of the tower

over which the wires were drawn as they came from the spools below. The spool end of the car was placed in front, or toward the track to be strung. The wires were drawn from the spools over the reels at the top of the tower and fastened to a pole or mast arm. The car was then pulled forward by an engine in the direction in which the work was progressing, and as the car advanced the wires unrolled from the spools and passed over the reels at the top of the tower. The end of a board or plank was placed under each spool, and a man pressed down on the other end. This acted as a brake to prevent the wires from unrolling too freely. As the spools grew lighter the brake would not work so effectively, and the spools would sometimes slip. The poles supporting the mast arms were set 100 feet apart, and as each mast arm was reached the wires were attached to it temporarily until another crew could follow after and put the wires in place, fastening them permanently. It was customary for three men to handle each wire, so that if both wires were strung at the same time there would be six men at work on the tower, but when the wires were strung singly, as was the case at the time of this accident, only three men were employed.

The gang to which the appellant was assigned was engaged in stringing wires on the siding at Blackwell Station. The tower car and engine blocked the main line, and the gang was in a hurry to get out of the way of an approaching passenger train. For that reason, instead of fastening the wires to each mast arm, they skipped two and were about to fasten the wires to a third. There was thus 300 feet of ½ or ⅝ inch wire hanging over the tower without a tie. The appellant raised the wire over his shoulder to the mast arm for the purpose of tying it, as he did so the wire or spool slipped, the appellant lost his balance, and in an effort to save himself involuntarily seized a live wire carrying 6,600 volts, about three feet distant from him. At the same instant, the wire he was stringing sagged to the ground behind

the car, thus forming a circuit which burned and injured the appellant most severely.

Under the foregoing facts, it seems to us there can be no recovery in this case, under well-established principles of law. Numerous grounds of negligence are charged by the appellant, but these with one exception relate to the general manner of doing the work, which was open and apparent to all. The exception to this general statement was an alleged direction given by the foreman to the man at the brake to slack the wire while the appellant was in a dangerous position. Such a direction was testified to by a witness who was on a pole about 100 feet distant from the foreman and the appellant at the time of the accident. But the appellant himself, and other of his witnesses who were on the tower with the foreman at the time, heard no such order or direction, and if we should assume that the testimony of this witness was sufficient to carry the case to the jury on that issue, the fact remains that the uncontradicted testimony shows that the order was not obeyed if given; so that, even though the order was negligently given, it was not carried into execution and was not the cause of the accident.

As stated above, the other grounds of negligence charged relate to the means or methods employed in stringing the wires, such as insufficiency of men, failure to tie the wire to every mast arm, the sagging of the wire, insufficiency of tools and appliances, the hurrying of the work, etc. All of these matters were as well or better known to the servant than to the master. The appellant candidly admitted that he was thoroughly familiar with the work and with the manner of doing it, and fully appreciated all the dangers incident to the hazardous employment in which he was engaged. He knew that if he came in contact with the two wires while the wire he was stringing was grounded the result would be disastrous if not fatal to him. His injuries resulted from dangers incident to his employment, which he clearly assumed. It would be idle to cite decisions from this and other courts

to that effect, but the rule is clearly stated in the following cases: *Week v. Freemont Mill Co.*, 3 Wash. 629, 29 Pac. 215; *Schulz v. Johnson*, 7 Wash. 403, 35 Pac. 130; *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679; *Bullivant v. Spokane*, 14 Wash. 577, 45 Pac. 42; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Brown v. Tabor Mill Co.*, 22 Wash. 317, 60 Pac. 1126; *Danuser v. Seller & Co.*, 24 Wash. 565, 64 Pac. 783; *Grout v. Tacoma Eastern R. Co.*, 33 Wash. 524, 74 Pac. 665; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867; *Ford v. Heffernan Engine Works*, 48 Wash. 315, 93 Pac. 417; *Brown v. Oregon Lumber Co.*, 24 Ore. 315, 33 Pac. 557.

Counsel for respondent express the hope that the American commonwealths will at an early day become sufficiently enlightened to enact rational and just laws prescribing the liability of the master to the servant for personal injuries suffered by the servant in the course of his employment in cases such as this—laws which will be just and certain in their operation to both the servant and the master. Such a consummation is devoutly to be hoped for, but until the change is wrought the rights of litigants and the duties of courts are measured by existing laws. We have no power of dispensation, and the property of others is not ours to dispose of at will. The judgment must therefore be affirmed.

FULLERTON, GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 8360. Department Two. February 4, 1910.]

# HAINES & SPENCER *et al.*, *Appellants*, v. H. G. KELLEY, *Respondent*.[1]

LOGS AND LOGGING—SALE OF TIMBER—EXECUTION—EVIDENCE—SUFFICIENCY. Whether there was a contract for the sale of timber is for the jury, where the evidence was conflicting and one of the parties testified to the making of the contract, after all other negotiations had failed, and it appeared that he gave a check for the amount to be paid, indorsed on the face "payment in full for all timber" on the tract in question, which check was cashed.

APPEAL AND ERROR—RECORD—AFFIDAVITS—NEW TRIAL. Error in refusing a new trial for newly discovered evidence will not be reviewed where the affidavits used on the application are not brought up by a bill of exceptions or statement of facts.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 5, 1909, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

*Edwin H. Flueck*, for appellants.

*Brant & Brown*, for respondent.

PARKER, J.—The issues in this case involve the right of the defendant to remove the timber from certain land of the plaintiffs. The plaintiffs allege that on March 23, 1908, a contract was entered into between them and the defendant in writing, whereby they were to sell to the defendant all timber upon the land in consideration of $250 cash, and the further consideration of defendant doing certain clearing and building certain sidewalks upon the land; a time limit being fixed for doing the clearing and building the sidewalks, and also for the removal of the timber. This alleged contract provides for forfeiture of all of defendant's rights thereunder in event of failure on his part to perform all the things therein required of him within the time limits speci-

[1]Reported in 106 Pac. 776.

fied. Attached to the complaint is a copy of the contract showing it was never formally signed by any of the parties, but the defendant indorsed thereon the following: "I hereby agree to the above proposition. H. G. Kelley." Plaintiffs further allege that defendant paid them the $250, and proceeded to, and had, removed a large part of the timber prior to the commencement of this case, but that he had failed to perform his part of the contract within the time limits provided, and thereby had forfeited all his rights thereunder.

The defendant denies that the contract set forth in the plaintiffs' complaint was ever entered into. He admits, in substance, negotiations resulting in the drawing up of the form of such contract, and the indorsement made by him thereon; but alleges that, before any money was paid thereon or anything done in performance thereof, and before plaintiffs had agreed to the terms of such contract, he notified them that his proposition was withdrawn. Defendant further alleges that thereafter he purchased the timber from the plaintiffs for $250 cash, without any other consideration whatever; that he paid the same and proceeded to cut and remove the timber, continuing to do so until he was restrained by order of the court in this case. Plaintiffs deny the affirmative matter alleged by defendant, and upon these issues the cause went to trial before a jury, all parties treating it as a jury case. A verdict was returned in favor of defendant, judgment entered accordingly, and thereupon plaintiffs appeal to this court.

Learned counsel for appellants first contend that the evidence does not justify the verdict. It is conceded that if the right of the respondent to remove the timber rests upon the contract sought to be proven by appellants he has forfeited such right by failure to perform his part of the contract; while it is also conceded, or rather not disputed, that if the contract of purchase of the timber sought to be proven by respondent is a valid subsisting contract he has the right to remove the timber. No question is raised as

to the time for removal of the timber under this contract, and it is conceded that respondent has paid appellants the $250, the only question of payment being as to which contract it was paid upon. It is apparent then that the only serious question of fact for the jury to determine is as to which of these contracts was actually made and entered into between the parties. There is serious conflict in the evidence as to when the $250 was paid, it being testified in behalf of appellants that it was paid at the time the respondent made the indorsement on the first proposed contract, while in behalf of the respondent it was testified that the payment was made a week or more later, when the alleged unconditional purchase of the timber was consummated. There is also conflict in the evidence as to the part performance of the first contract in the way of doing some of the work and improvement specified therein as part of the consideration for the timber. There is also conflict in the testimony as to the appellants finally adopting or accepting the terms of the contract sought to be proven by them, though it is admitted they never formally signed it.

The respondent testified, among other things, that before paying the $250, before removing any of the timber, and before appellants had in any manner accepted the terms of the first proposed contract, he had conversations with Spencer, with whom his dealings were had, wherein he said to Spencer that he would drop negotiations, that "there was nothing done for two or three days, and one day Mr. Spencer called me up, and I went in, and he said: 'How much will you give us for that wood down there?' (Evidently meaning the same timber.) I said: 'I will give you $250.' He says, 'Clear the streets?' I says, 'No.'" He testified about the deal being consummated later, as follows: "Will you tell us what took place the day you bought this wood? A. The morning of the 31st of March, I think Mr. Spencer called me up at the house, and said they would accept that $250 in cash, and I went up there that morning and gave

him a check for $250." The check is offered in evidence, dated March 31st, payable to Haines & Spencer, and has indorsed on the face thereof, "Payment in full for all timber on Evergreen Tract Add." This is the same timber in question. This check appears to have been cashed by appellants. Without reviewing the evidence further, we think this is sufficient to clearly show it presents a question of fact for the jury. There was at least a serious conflict in the evidence, and therefore, the finding of the jury became conclusive. *Smith v. Michigan Lumber Co.*, 43 Wash. 402, 86 Pac. 652; *Irwin v. Buffalo Pitts Co.*, 39 Wash. 346, 81 Pac. 849; *Johnston v. McCart*, 24 Wash. 19, 63 Pac. 1121.

One of the grounds of plaintiffs' motion for a new trial was newly discovered evidence. It is urged that the trial court was in error in not granting the motion on this ground. We are not able to consider this alleged error for the reason that no affidavits or evidence of any nature in support of this ground of the motion has been made a part of the record by a bill of exceptions or a statement of facts; so we have no means of knowing what showing was made to the court in support of that ground of the motion. It has been repeatedly held that this court will not review alleged errors of the trial court in disposing of a motion determinable by facts to be shown by affidavits or other evidence, when such affidavits or evidence is not made part of the record in the cause by bill of exceptions or statement of facts. *Jacobson v. Lunn*, 16 Wash. 487, 48 Pac. 237; *Griggs v. MacLean*, 33 Wash. 244, 74 Pac. 360; *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535, 77 Pac. 839; *Taylor v. Modern Woodmen of America*, 42 Wash. 304, 84 Pac. 867.

We are of the opinion that the judgment of the trial court should be affirmed. It is so ordered.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8432. Department Two. February 4, 1910.]

## J. G. CURTIS, *Respondent*, v. A. L. PARKS, *Appellant*.[1]

SALES—BREACH—REMEDIES OF BUYER. Where a seller repudiates the contract of sale and refuses to perform, the vendee may recover damages resulting from part performance and loss of profits without proceeding to full performance upon his part.

PLEADING—COMPLAINT—AMENDMENT—WAIVER OF OBJECTION. An answer on the merits without objection waives an objection at the trial that an amended complaint is a departure and states a different cause of action from the original complaint.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 12, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

*H. R. Clise* and *John E. Ryan*, for appellant.

*McBurney & Cummings*, for respondent.

PARKER, J.—This is a suit to recover damages growing out of a contract for the sale of the livery business of the defendant to the plaintiff. The cause was tried by the court without a jury, and the court found the facts in substance as follows: In March, 1909, the livery business of the defendant being heavily indebted, he entered into an agreement for the sale and transfer thereof to the plaintiff, whereby the plaintiff was to discharge $1,250 of such indebtedness, in consideration of which the business was to be transferred to him. Thereupon, in part performance of the agreement of sale, the plaintiff paid and discharged $312.50 of the indebtedness, and was ready, willing, and able to do all things required of him under the terms of the agreement to entitle him to a performance of the contract on the part of the defendant, all of which was known to the defendant, when he repudiated the agreement and refused to make the transfer.

[1]Reported in 106 Pac. 740.

At the time of making the agreement and at all times since then, the business was and is of the value of $1,700. Upon these facts the court concluded that the plaintiff was entitled to recover from the defendant $312.50, the amount of debts discharged by plaintiff, and the additional sum of $250 damages. Judgment was rendered accordingly, and thereupon the defendant appealed to this court.

Error is assigned upon appellant's exception involving the sufficiency of the evidence to support the findings and judgment. A careful review of the evidence convinces us that the findings are fully justified thereby. Under this assignment it is also contended by appellant's counsel, if we understand them correctly, that until the respondent had fully performed his part of the contract he would have no cause of action against the appellant for damages. We think, however, that when the appellant repudiated the contract and signified his intention not to make the transfer, the respondent was not required to proceed further in the performance of his part of the contract, and he could then successfully maintain his action for damages based upon appellant's refusal to perform.

On May 3d the respondent filed an amended complaint. On May 7th appellant filed his answer thereto, joining issue upon the merits. On May 10th, at the beginning of the trial, appellant objected to the introduction of any evidence by the respondent in support of the allegations of the amended complaint, and moved to strike the amended complaint upon the ground that the same stated an entirely different cause of action from that set forth in the original complaint. This, so far as the record shows, appears to be the first attack made by appellant upon respondent's amended complaint other than by answer upon the merits. It seems clear to us that appellant's objection, coming after voluntarily answering the amended complaint upon the merits, is too late. Such answer waived all objections to the amended complaint of that nature. The amended complaint states a

cause of action, and when appellant answered the same upon the merits without in any other manner attacking it, all such issues as is here attempted to be raised were eliminated.

Other alleged errors are discussed in the briefs, but they do not involve questions which would affect the determination of the rights of the parties upon this appeal whether such questions were resolved in favor of appellant or respondent, therefore they need not be noticed. We are of the opinion that the learned trial court correctly determined the rights of the parties, and its judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

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[No. 8483. Department One. February 4, 1910.]

HENRY REICHLING, *Respondent*, v. COVINGTON LUMBER COMPANY, *Appellant*.[1]

EMINENT DOMAIN — TITLE ACQUIRED — FEE — DEVOTION TO OTHER USES—EFFECT. Where a full fee simple title is condemned by a city for a particular use, and the award is paid out of the general fund and accepted, the land does not revert to the owner upon the city's devoting it to some other use; and the former owner cannot complain if an easement therein is subsequently granted to a railroad company.

Appeal from a judgment of the superior court for King county, Main, J., entered June 22, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for an injunction. Reversed.

*Graves & Murphy* and *Charles H. Winders*, for appellant, cited, among other authorities: 2 Dillon, Municipal Corporations (4th ed.), § 589; Lewis, Eminent Domain, § 596; 10 Am. & Eng. Ency. Law (2d ed.), p. 1198; *Seattle Land*

[1]Reported in 106 Pac. 777.

*and Imp. Co. v. Seattle*, 37 Wash. 274, 79 Pac. 780; *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991; *Brooklyn Park Commission v. Armstrong*, 45 N. Y. 234; *Matter of City of New York*, 190 N. Y. 350, 83 N. E. 299; *Dingley v. Boston*, 100 Mass. 544; *Page v. O'Toole*, 144 Mass. 303, 10 N. E. 851; *Hellen v. Medford*, 188 Mass. 42, 73 N. E. 1070, 108 Am. St. 459, 69 L. R. A. 314; *Delosier v. Pennsylvania Canal Co.* (Pa. St.), 11 Atl. 400; *Chesapeake & Ohio R. Co. v. Walker*, 100 Va. 69, 40 S. E. 633, 914; *Driscoll v. New Haven*, 75 Conn. 92, 52 Atl. 618; *Malone v. City of Toledo*, 34 Ohio St. 541; *Haldeman v. Pacific Cent. R. Co.*, 50 Pa. St. 425; *Curran v. Louisville*, 83 Ky. 628; *Water Works Co. v. Burkhart*, 41 Ind. 364.

*Charles E. Patterson* and *James M. Gephart*, for respondent, cited: *Matter of Albany Street*, 11 Wend. (N. Y.) 149; *In re John and Cherry Streets*, 19 Wend. (N. Y.) 659; *Jessup v. Loucks*, 55 Pa. St. 350, 361; *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325; *Taylor v. Porter & Ford*, 4 Hill 140; Elliott, Roads and Streets (2d ed.), p. 242; *Newton v. Manufacturers' R. Co.*, 115 Fed. 781; *Lyon v. McDonald*, 78 Tex. 71, 14 S. W. 261, 9 L. R. A. 295; *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325. The statute should be construed as authorizing the taking of an easement only. 15 Cyc. 1018, 1019, 1021, 1024; *Spokane v. Colby*, 16 Wash. 610, 48 Pac. 248; *Fairchild v. St. Paul, supra; Conklin v. Old Colony R. Co.*, 154 Mass. 155, 28 N. E. 143; *Vought v. Columbus etc. R. Co.*, 58 Ohio St. 123, 50 N. E. 442; *State ex rel. Kent Lumber Co. v. Superior Court*, 46 Wash. 516, 90 Pac. 663.

Morris, J.—Appeal from a decree of the lower court enjoining appellant from entering upon certain lands in King county, cutting and removing timber therefrom, and also from constructing a logging railroad upon and across the lands. The facts, except a few that are not material to this discussion, are admitted, and from them it appears that, in

1898, the city of Seattle commenced condemnation proceedings to acquire lands in the vicinity of Swan lake for the purpose of its Cedar River water system. In its petition the city set forth its intention to acquire an easement over and upon certain described lands, and to acquire a "fee simple to the following lands." Then follows a description of certain lands, including the land in controversy. The respondent appeared in the proceedings as the owner of the land, and a trial was had to ascertain its value, resulting in an award "for the taking of the" land in question.

Respondent made a motion for a new trial, which being denied, a decree was duly entered, awarding "the fee simple" to the land to the city, upon payment of the sum fixed in the verdict, which was subsequently paid into court from the city's general fund, and the same was withdrawn by respondent. In 1907 the city passed an ordinance whereby it granted a license to appellant to construct a logging railroad over the lands, such right to exist for ten years. Appellant entered upon the lands for the purposes granted in its license, when respondent brought this action to restrain it, claiming to be the owner of the lands as against all persons save the city, and that the use of the city was confined to the express uses and purposes indicated in its condemnation petition, which did not include the construction of railroads, and that the building of the railroad created an additional burden upon the land. This was the view taken by the trial judge, and the ground upon which the injunction was decreed.

Under the petition upon which the condemnation case was tried and the decree therein entered, the city acquired the absolute fee to the land. We must assume that, in the use of the words "fee simple" in the petition, it was the express purpose and intention of the city to acquire the absolute title, and such purpose and intention was found by the court to be a public and necessary use in its decree of appropriation, and that the subsequent use of the expression in the

decree was an expressed intention of the court to vest the whole title to the lands in the city. Such judgment having become final, fixed and forever determined the rights of the city and respondent as to their respective interests in this land, and respondent cannot now be heard in this proceeding to in any way question the title of the city. If the city under the condemnation decree acquired the fee in the lands, it is now immaterial whether such fee was necessary to its use or not. When it paid the sum fixed as its value and respondent received such sum, all the constitutional requirements had been complied with, and the title fully vested in the city according to the terms of the decree. This being so, it follows that there was, and could be, no reversion of right or interest in respondent to the lands, whether the city used the lands for the purpose indicated in the petition or not.

"Where a fee simple is taken, the weight of authority is that there is no reversion, but, when the particular use ceases, the property may, by authority of the state, be disposed of for either public or private uses." Lewis, Eminent Domain (2d ed.), § 596.

See, also, 2 Dillon, Municipal Corporations (4th ed.), § 589.

This question was directly before this court in *Seattle Land & Imp. Co. v. Seattle*, 37 Wash. 274, 79 Pac. 780, where the city condemned land for a public park and afterwards used the same to erect thereon an "In Town Terminal Substation," for use in connection with its lighting plant, and it was there said that,

"Where property is taken, and paid for from the general fund, with the intention of using it for a certain purpose specified in the ordinance authorizing the taking, as was done in this case, the city, doubtless, has the authority to change said contemplated use to another and entirely different use, whensoever the needs and requirements of the city suggest."

In that case stress was laid by the court upon Rem. & Bal. Code, § 7507, subd. 3, wherein it is provided that cities of the first class shall have power "to acquire, by purchase or

otherwise, such lands and other property as may be necessary for any of the corporate uses provided for by its charter, and to dispose of any such property as the interests of the corporation may, from time to time, require." Bal. Code, §§ 781 and 787, which are parts of the act of 1893, under which this condemnation suit was instituted, provide for the damaging of property or the taking of a part or the entire interests therein, which would seem to be sufficient authority to permit the city to acquire the right to damage or to take the entire interest and possession of the owner in such property as it deemed necessary for its municipal use and purpose.

In *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68, it was sought to obtain a tax title to certain lands acquired by the city under the same condemnation proceedings reviewed here, and in referring to the title of the city to the lands there in controversy, it is said:

"It is a necessary deduction from the premises that the city took the full fee simple title and the interest, both present and prospective, of all concerned in the property."

These cases and the reasoning and authority upon which they are based are decisive of the questions here presented.

Respondent places much reliance upon the case of *Spokane v. Colby*, 16 Wash. 610, 48 Pac. 248, in which it appears that the city of Spokane had condemned land "for the purpose of securing a right of way to lay and maintain a pipe line to connect its pumping station with its distributing station." Afterwards the city made a contract with a telephone company to construct a line from the pumping station to a central fire station, and we held the erection of such a telephone line was an additional burden or element of damage, and could not be enforced upon the rights obtained by the city in the original condemnation proceedings.

It is apparent that the right obtained by the city in that case was a mere easement in the land, a right to use only for the purpose of the specific easement granted, and that

right having only been compensated for, an additional use and burden could not be laid upon the land without additional compensation. No such question arises here, as the right sought by the city was not an easement nor a right to damage in a specific manner, but it sought to condemn and divest the owner of his entire interest in the land and to acquire the fee simple title in itself. The city's right to the use and possession of the land was not therefore, as in the *Spokane* case, confined to any special or damaging use, but it was an absolute taking and divested the owner of all rights of use and possession. The cases not being analogous, the rule laid down in the *Spokane* case cannot benefit the respondent here. We hold the court below was in error in treating the use of the appellant as an additional easement upon the land and the impress of a burden not acquired under the condemnation proceedings, and its judgment is reversed, and the cause remanded with instructions to dismiss.

RUDKIN, C. J., GOSE, CHADWICK, and FULLERTON, JJ., concur.

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[No. 8485. Department Two. February 4, 1910.]

ELIZABETH HASE, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—OPINIONS. In an action for personal injuries sustained upon a defective sidewalk, after a witness for plaintiff has been asked upon cross-examination whether a person exercising ordinary care could have observed the defect, it is not prejudicial error to allow plaintiff's counsel to ask whether the plaintiff was walking in the ordinary manner, if the answer did not express any opinion as to plaintiff's contributory negligence.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $4.500 for a fall upon a defective sidewalk, resulting in the breaking of a forearm just above the wrist, is excessive, and should be re-

[1]Reported in 107 Pac. 515.

duced to $2,500, where it appears that the plaintiff, a woman of 54 years of age, had not been engaged in heavy work, that the fracture was set with good results, although not allowing as full movement as before, and while the wrist was weak it was getting stronger, and no other serious injury was shown.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 15, 1909, upon the verdict of a jury rendered in favor of the plaintiff, for $4,500 for personal injuries. Reversed, and a new trial ordered unless $2,000 is remitted.

*Scott Calhoun* and *James E. Bradford*, for appellant.

*Shorett, McLaren & Shorett*, for respondent.

Crow, J.—Action by Elizabeth Hase against the city of Seattle to recover damages for injuries sustained by falling through a defective sidewalk. From a judgment in her favor, the defendant has appealed.

One Stella Schurtleff, who was with respondent at the time of the accident about 9:30 p. m. on March 23, 1907, was called as a witness in her behalf. On her cross-examination, counsel for appellant, in asking how far she and respondent could see when walking, proceeded as follows:

"Q. You could see ten or twelve feet at least? A. I suppose I could. Q. If a person had been exercising ordinary care in going along there in the night, and looking down, you would have had no difficulty in seeing the missing plank, would you? Mr. Shorett (counsel for respondent): I object to that as an improper question. The Court: She may answer. A. I don't know about that. We were walking right along talking. Q. Well, you think you could see ten or thirteen feet. You would have had no difficulty in seeing a hole in the sidewalk if you had looked down, would you? A. Well, I suppose if we had been looking right down."

On re-direct examination the following occurred:

"By Mr. Shorett: Q. Were you and Mrs. Hase negligent in coming down that hill? Mr. Bradford (counsel for appellant): I object to that as incompetent, irrelevant and

immaterial. That is a question of fact to be passed upon by the jury and not by the witness. The Court: I think the objection is well taken. Q. At the time you were going down that walk, were you going down there in the ordinary manner? Mr Bradford: That is objected to as leading and argumentative, and asking the same question indirectly. The Court: That is somewhat leading, but she may answer. A. Yes. Mr. Bradford: I now move to strike the answer from the record, for the reason that it is incompetent, irrelevant and immaterial. The question was in the most leading and suggestive form that could be imagined and is asking the witness to pass upon the fact which is the exclusive province of the jury to pass upon. The Court: Motion denied. Mr. Bradford: Exception."

Appellant's counsel now contends that the trial judge erred in overruling his objection and his motion to strike; that the issue of contributory negligence was for the jury, and that the witness was permitted to express her opinion as to whether respondent was negligent, thus invading the province of the jury. It is manifest that no prejudicial error was committed. Appellant's counsel, over respondent's objection, had been permitted to ask the witness whether a person *exercising ordinary care* could observe the absence of the missing plank, and although respondent's attorney afterwards asked her whether respondent did exercise ordinary care, it does not follow that appellant was thereby prejudiced or that she expressed any opinion as to contributory negligence on the part of the respondent.

Appellant next contends that its motion for a nonsuit should have been granted, insisting that the respondent was guilty of contributory negligence as a matter of law and not entitled to recover. We have examined all the evidence, and find it amply sufficient to convince us that the issue of contributory negligence was a question for the jury.

Appellant further insists that the judgment is excessive. This contention must be sustained. While the respondent claims some other injuries, causing pain and nervousness,

it is apparent that her most serious injury was a fracture of one of the bones of her left forearm just above the wrist. The jury awarded her $4,500, and judgment was entered for that amount. The arm was properly set. She was disabled for some time, but the union of the bone produced what the surgeons call a good result. The respondent herself testified as follows:

"Q. Mrs. Hase, you have no difficulty, have you, in moving your fingers? A. I can move them, yes. Q. You have pretty fair use of your wrist, haven't you, for light work? A. Well, yes, it is pretty light though. Q. You say it is hard for you to do heavy washing? A. I have never done any heavy washing. I have done laundry work but it was not heavy laundry work. Q. That is the work you were engaged in before you were injured? A. Yes. Q. You have reasonably fair use of the injured wrist, haven't you, in all directions, at the present time? A. I can move it around, yes, sir. Q. Now under the professional care and skill and treatment of the doctors, your wrist of course will grow progressively better? A. Well, it got better. Q. That is true, is it not? A. Yes, sir, it is better."

The physician who set the arm and attended her afterwards, on re-direct examination, testified as follows:

"Q. What is the condition of that wrist at the present time? A. Well, she has very good function in it. Very good condition. It is a little weak and while she has not all the movement that she had in the other wrist still it is as well as can be expected."

Evidence of other physicians was practically the same. It appeared that certain tendons of the wrist had adhered to the bone, causing respondent to partially lose the use of two fingers. It also appeared by her own statements the she suffers from pains in her back and is constantly nervous. She was fifty-four years of age at the time of the accident. No other proof of injuries was made, and no witnesses were called by the appellant. Although damages in actions for personal injuries are to be determined by juries, there must be some reasonable limit to the awards they are permitted

to make. Such damages are to be allowed for compensation only, and not as a punishment or confiscation. The verdict is excessive. It extends beyond the limits of just compensation for the injuries sustained. It is ordered that, if within thirty days after the filing of the remittitur, the respondent shall elect to remit $2,000 from the damages awarded, the judgment as thus reduced be affirmed, and that otherwise a new trial be granted. The appellant will recover its costs in this court.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

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[No. 8252. Department One. February 4, 1910.]

EDWARD W. EYANSON *et al.*, *Appellants*, v. ELIZABETH WAIDLICH *et al.*, *Respondents*.[1]

COMPROMISE AND SETTLEMENT—EVIDENCE—SUFFICIENCY. A release or waiver of claims sufficiently shows a settlement between the parties respecting lands jointly bought, one party having made advances for and taken a mortgage upon the interest of the other, where the release describes the land and recites that, in consideration of $250 and of the surrender and cancellation of the note and mortgage, the mortgagor declares that he has no interest in the land, which had previously been quitclaimed to the mortgagee.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—QUITCLAIM DEED. The grantee in a quitclaim deed, for value and without notice, is a bona fide purchaser, within the recording acts.

Appeal from a judgment of the superior court for King county, Main, J., entered April 20, 1909, in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to quiet title. Affirmed.

*Vince H. Faben* and *S. H. Kelleran*, for appellants.

*Edward Von Tobel* and *Jesse A. Frye*, for respondents.

[1]Reported in 106 Pac. 746

CHADWICK, J.—This action was begun by Thomas E. Eyanson, who thereafter died, and is now prosecuted by plaintiffs, who are his heirs and legal representatives. In the year 1892, Thomas E. Eyanson, Dr. A. P. Mitten, and C. D. Waidlich, the ancestor of defendants, purchased a tract of land in King county, Washington. At the time, Eyanson and Mitten were residents of Seattle, and Waidlich was then, and up to the time of his death in 1902, a resident of the state of Indiana. The purchase price of the tract was $30,000. Eyanson and Mitten each paid $5,000, Waidlich paid $10,000, being his share in full, and also advanced $10,000 to pay for the interest of Eyanson and Mitten, for which they made a joint note and mortgage on their two-thirds' interest in the land, but with the understanding reserved that each was bound severally and not jointly to pay the sum of $5,000. This agreement seems to have been observed by all parties in all their subsequent transactions.

In 1893 Eyanson, being somewhat embarrassed financially, made a deed of his interest in the land to Jacob Neizer, a brother-in-law. The consideration expressed in this deed was the sum of $10,000. Neizer was a resident of the state of Indiana. It is not denied that this deed was made without consideration and solely for the purpose of putting the property beyond the reach of Eyanson's creditors. On the next day after the deed was executed, Neizer made a quitclaim deed to Amanda E. Eyanson. This deed was put on record December 17, 1906, by one of the heirs of Amanda E. Eyanson. It will be observed that this deed was recorded thirteen years after its execution and nine years after the death of Mrs. Eyanson. Both Mitten and Eyanson were unable to meet the terms of their obligation. Dr. Mitten caused his interest in the land to be conveyed to Waidlich in satisfaction of his debt, in the year 1895. Eyanson seems to have acted somewhat in the capacity of an agent for Waidlich with reference to the land, and between

the year 1893 and the time of his death carried on considerable correspondence with his principal, not only with reference to the settlement of his own indebtedness, but also with reference to the sale and probable value of the land. Eyanson never paid anything upon account of his indebtedness except a part of the sum of $693, paid as interest. This sum was the aggregate of smaller payments made between November 15, 1893, and November 30, 1897. Waidlich seems to have been disposed to give Eyanson, who had been his former partner and lifelong friend, every chance to make something out of the land. He was on the ground, knew its value, and was able to find a market for it if there had been any. That Eyanson and Waidlich had frequent negotiations tending toward a settlement of their differences there can be no doubt. Their final determination must be gathered from such documentary evidence as is found in the record. This makes it plain that, so far as Eyanson and Waidlich were concerned, their affairs were finally settled early in the year 1901. On October 4, 1900, Waidlich wrote Eyanson:

"I received your letter a few days ago and in answer will say that the contents of your letter was very much encouraging to me, because our outlook for us both seems to be brightening up on our land speculation, and we may come out all right yet, and so use your own pleasure in sending the papers as you had arranged when you were here."

And on May 10, 1901, Waidlich wrote as follows:

"Now I have no doubt but that you looked for a letter long ago but I could not decide just how I should answer on account of the interest you spoke of. I brought the matter before Marshal & McNagney and they could not see how and what an interest I could make and the only way for you to do to hold your interest as it stood and as I was willing to be contented as long as there was any prospect for to realize and make profits on the land for us both, and now as you have made me a deed for your interest I will and must say that if the land can be sold over and above my

claim whatever profit there would be I surely will remember you, for I could not be satisfied without doing with you what I consider right with you. And if you will advise me at any time that the sale could be made with profit let me know and I will depend on your judgment the proper time to sell, and I will still depend on you to look after my interest. If you will look after my taxes and let me know or any other matter that will come up to be looked after as I have no one else there that I could depend on only you. . . . Now if you will find out the amount of my taxes please let me know and all expenses I should pay you in the transaction of our business, send bill and I will send you draft for amount."

These letters must be construed and their meaning determined by reference to a deed made by Neizer to Waidlich by which he conveyed the Eyanson interest on August 4, 1900, and a deed correcting this transfer made April 15, 1901. Both of these deeds were recorded in King county, Washington, at the request of Thomas E. Eyanson. Thereafter Waidlich paid all taxes and assessments against the property. On July 8, 1904, Eyanson, in consideration of $250, signed two written releases or waivers of all claims in or to the estate of Waidlich. In one of these the land here involved was particularly described. It is recited:

"I further declare that I have had no interest whatsoever in that certain real estate situated in King county, Washington, described as the northeast one-quarter of the southeast one-quarter of Section Fourteen, Township Twenty-five north, of range three east, except a five acre tract described as follows: Commencing at the southeast corner of the northeast one-quarter of the southwest one-quarter, section fourteen, township twenty-five north, of range three east, running thence south twenty rods, thence west forty rods, thence south twenty rods, thence east forty rods to the place of beginning, since August 4th, 1900, the date when said property was conveyed to said Christian D. Waidlich, deceased; said conveyance having been made in consideration of the surrender and cancellation of the note and mortgage held by the said Christian D. Waid-

lich, executed by myself and others, and other good and valuable considerations."

This record shows a settlement between Eyanson and Waidlich, and is sufficient to conclude the rights of Thomas E. Eyanson and all those claiming under him.

But appellants assert that the money, the $5,000 originally put into the land by Eyanson, was the separate property of Amanda E. Eyanson, and that, the legal title being in her, the quitclaim deed from Neizer to Waidlich could not bar the right of her heirs to assert their interest; in other words, that the grantee under a quitclaim deed is not a *bona fide* purchaser within the recording acts. This question has been recently decided by this court contrary to appellants' contention. *McDougall v. Murray, ante* p. 76, 106 Pac. 490. So that, whether Waidlich took title from Neizer or took the title belonging to Amanda E. Eyanson, admitting that she had any title, he was, under the rule just announced, a purchaser in good faith under the recording acts.

It is unnecessary to further review the very able brief of appellants. Judgment affirmed.

RUDKIN, C. J., GOSE, FULLERTON, and MORRIS, JJ., concur.

[No. 8219. Department One. February 4, 1910.]

## CLINE PIANO COMPANY, *Appellant*, v. BENJAMIN W. SHERWOOD *et al.*, *Respondents*.[1]

EXECUTION—INVALID WRIT—INJUNCTION—REMEDY AT LAW. A party whose property is seized on an invalid writ of execution has his choice of remedies, and the fact that he has a remedy at law to quash the execution or recover the property, will not bar his remedy in equity by injunction, since it is more speedy and efficacious to obviate a lien pending trial on the merits.

ATTORNEY AND CLIENT—CONTROL OF LITIGATION—SETTLEMENT BY CLIENT. An agreement between the parties to an action for a dismissal, without costs, is effective as a settlement without a formal order of dismissal; since the parties may settle and satisfy the debt pending entry of the judgment.

ATTORNEY AND CLIENT—LIEN—JUDGMENT—ENTRY—NECESSITY. An attorney's lien on a judgment cannot attach upon the oral announcement of the decision at the conclusion of the trial, but a written judgment must be formally entered, under Rem. & Bal. Code, § 136, authorizing an attorney's lien upon a judgment rendered, to the extent of the value of his services in the action, "by the filing of a notice of lien to be entered on the execution docket" (CHADWICK, J., dissenting).

ATTORNEY AND CLIENT—SETTLEMENT OF ACTION—FRAUD UPON ATTORNEY. A settlement of a pending action by the parties will not be set aside because it defeats an attorney's lien for services, where the evidence does not warrant a finding of collusion and fraud on the part of the parties, taking into consideration a counterclaim set up in good faith and the fact that the law favors settlements.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 22, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to vacate a judgment and enjoin the sale of property under execution. Reversed.

*Roberts, Battle, Hulbert & Tennant*, for appellant.

*Leroy V. Newcomb* and *Frank P. Rutherford*, for respondents.

[1]Reported in 106 Pac. 742.

Gose, J.—On the 13th day of February, 1907, the taking of testimony having been concluded in that certain case wherein R. L. Burton et al. were plaintiffs and the Cline Piano Company was defendant, the Honorable Boyd J. Tallman, a judge of the superior court in King county, announced from the bench that he would render a judgment in favor of the plaintiffs for the sum of $171.25. No judgment was at that time formally entered. On February 14, Burton's attorneys, Sherwood & Mansfield and Percy F. Thomas, respondents in the present action, filed the following document, intending it to be a lien on the judgment:

"Come now the attorneys of record for the plaintiff and for one of the defendants, Mrs. R. L. Burton, in the above entitled action, and claim a lien upon the judgment entered in the above entitled action, in the sum of sixty (60) dollars, being the balance due for services rendered as such attorneys for the plaintiff and said defendant, Mrs. R. L. Burton, from the commencement of the case until after said judgment was rendered."

On March 18, 1907, Burton and the Cline Piano Company settled their differences without the intervention of their attorneys, and in consideration of the sum of $40 Burton made and delivered the following satisfaction:

"For and in consideration of the sum of $40 gold coin to him paid, the receipt whereof is hereby acknowledged, R. L. Burton, the plaintiff above named, hereby acknowledges full payment and satisfaction of all his claim against the defendant Cline Piano Company, arising out of the above-entitled action, and hereby agrees that said action shall be dismissed without costs to the said defendants and that no judgment be entered against said defendant in said action.

"R. L. Burton, Plaintiff."

This satisfaction was filed with the clerk on the date of its execution. Thereafter, on June 8, 1907, it being ascertained that judgment had not been entered, Judge Tallman signed and caused to be entered a formal written judgment. On June 15, a lien was filed against the judgment in

the sum of $60 by the attorneys, respondents here, at which time they also released the judgment to the extent of $111.25, leaving a balance due of $60, and caused execution to be issued thereon; whereupon appellant began this action to restrain the enforcement of the execution and to compel a satisfaction of the judgment.

It is first urged that, appellant has mistaken its remedy; that it should have moved the court to recall and quash the execution issued in the pending action, or pursued its remedy at law to recover any property that might have been levied upon; that either of these remedies was adequate, and therefore barred the jurisdiction of equity. Unquestionably there is substantial authority to sustain this contention. But the authorities are divided, and we think this court has committed itself to the doctrine that a party whose property is about to be seized upon an invalid or void writ may have his choice of remedies. *Grant v. Cole*, 23 Wash. 542, 63 Pac. 263.

The rule is recognized, but not discussed, in the later case of *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937. It is true that equity will not usually interfere when there is an adequate remedy at law. But this court has defined that term. It does not mean that the writ shall be denied because there is a remedy at law, but that it will be granted if it appears to be the more speedy and efficacious remedy. Being a preventative writ, it is issued in such cases to obviate a lien that would otherwise remain attached pending a trial upon the merits. The defendant in such cases it not injured, for he is protected by a bond and, although the rule may be opposed by the weight of authority, we think the rule adopted by this court is more consistent with the theory of the reformed procedure.

It is next asserted, that the satisfaction of the judgment executed by Burton and filed by appellant was ineffectual to accomplish the purpose of the parties; that it was an attempt

to dismiss the action, and that the court must have made a formal order of dismissal in order to give it effect. While some of the authorities cited by counsel seem to bear out their contention, they cannot be held to be applicable to the facts in this case without holding that the parties to an action cannot settle and satisfy the debt found to be due by the court pending the entry of the judgment. This we are unwilling to do.

It is next asserted that, in any event, the lien of the attorneys is unimpaired, and that the appellant is liable therefor. The rule is that, whatever the nature of the action may be, the lien of an attorney does not attach until there is a judgment. But, if attached, it cannot be affected by a subsequent compromise or settlement of the case by the parties made with notice of the lien. 3 Am. &. Eng. Ency. Law (2d ed.), 466.

Rem. & Bal. Code, § 136, provides that an attorney shall have a lien upon a judgment to the extent of the value of his services "from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed, and date of filing notice." The law of this case depends upon the solution of the question, when does the order of the court become a judgment; upon the announcement of the court at the conclusion of the trial that his ruling is in favor of the one party or of another, or when that announcement is written out and formally entered by the court? It is our opinion that a lien cannot attach until the written judgment is formally entered. The cases in which the distinction between the rendition of a judgment and the entry of a judgment have been pointed out by this court were marshalled in *State ex rel. Brown v. Brown*, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974. In that case the court

adopted certain expressions on the part of the supreme court of California which are pertinent to this case:

"In *Condee v. Barton*, 62 Cal. 1, it is said: 'There is no judgment which is final until a judgment is recorded.' And in *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211, the court said: 'The judgment which was prepared and signed by Judge Rooney could not be effective as a judgment until it was filed with the clerk. Until then it was but a purpose in the breast of the judge, which could be changed as he might determine. Whether he deposited it in the postoffice to be transmitted to the clerk, or himself carried it in person to the office of the clerk, is immaterial. Until it was actually filed it did not become a part of the records in the case and consequently was not a judgment.' "

In the later case of *Gould v. Austin*, 52 Wash. 457, 100 Pac. 1029, in which the case of *State ex rel. Jensen v. Bell*, 34 Wash. 185, 75 Pac. 641, was quoted with approval, it was finally declared as the law in this state that the formal written judgment must be deemed the actual judgment of the court, and that previous recitals cannot ordinarily be held to be binding on the parties or the court. In speaking to the exact point which we have before us, it is said in 3 Parsons on Contracts, 269:

"But the lien on the cause for his fees does not attach until the judgment is entered. Therefore, where in a case reserved, after the opinion of the court was pronounced in favor of the plaintiff, he forthwith assigned his interest in the judgment, and the defendant, during the term, and before the judgment was actually entered, paid the whole amount to the assignee,—it was held that the attorney's lien was thereby defeated:"

citing *Potter v. Mayo*, 3 Greenl. (Me.), 34, 14 Am. Dec. 211.

There is a suggestion of collusion between Burton and appellant in the pleadings and in the evidence. Where it appears that the parties have conspired to defeat the attorney's compensation, a court will, upon a proper showing, allow the case to proceed at the instance of the attorney in order to

protect his lien. It has also been held by some courts that the inadequacy of the settlement is evidence of collusion and fraud on the part of the parties to the action, but the testimony in this case does not warrant a finding of collusion or fraud, when viewed in the light of the law that settlements, whether made in or out of court, are to be encouraged, and when considered in connection with the further fact that, upon the trial of the main case, the Cline Piano Company set up a counterclaim which it no doubt asserted in good faith.

The judgment of the lower court is reversed, and the cause remanded with instructions to enter a decree in favor of appellant.

RUDKIN, C. J., and FULLERTON, J., concur.

MORRIS, J., took no part.

CHADWICK, J. (dissenting)—I dissent from that part of the opinion of the majority which holds that the lien of the attorneys cannot be allowed. The authorities relied upon sustain the majority opinion and, while I believe that a proper rule was declared by this court in the cases cited, wherein it is held that an order of the court cannot be given the force of a judgment until it is formally entered as such, yet, like all rules, it should be measured by other rules with which it may come in contact. It is declared by all courts that an attorney should be protected in his service. The older rule that the laborer is worthy of his hire has been applied, and as between the parties to a proceeding and those standing in their shoes, the lien of an attorney should be held to attach when the court has announced his judgment, albeit the entry is not made at the time. So far as I have been able to discover, there are but two cases in the books directly in point. The one is the case in Greenleaf's reports cited in the majority opinion, the other is the case of *Young v. Dearborn*, 7 Foster (N. H.) 324. In the latter case the case had been tried and an order made that judgment should

be entered on the verdict. The judgment remained to be entered in form at the next term of the court to be holden some weeks later. Pending this formality a discharge was obtained. Nevertheless the lien of the attorney was sustained, the court saying:

"For some purposes, the judgment is regarded as rendered only from the time when the actual entry is made upon the records of the court below. If there is an attachment, the lien of the attachment continues until the expiration of thirty days after the entry of a judgment such as an execution may issue upon. So a prisoner, on mesne process, will be detained in prison for the same time. But for the purpose of securing the lien of the attorney, we think that the order of the court that judgment be entered, is to be deemed the judgment. Such order is a final determination of the case, the end of all litigation and controversy as to the merits of the case. The time when the judgment is entered up in form, seems to us entirely immaterial for this purpose. We are not able to discover, under our law and the practice under it, any difference between the case of an order made by the superior court, for a judgment to be rendered in the common pleas, and a like order made by that court itself. Time must ordinarily elapse between the making of such orders and the actual entry of judgments; but the delay ought not to affect the rights of the parties or their attorneys, relative to the subject of the controversy. For the purpose of ascertaining their rights in this respect, the order of the court for judgment should be deemed the judgment itself. Upon this view, the attorney acquired a complete and perfect lien upon the judgment, by the order of the superior court, and the defendant having had actual notice of his claim, when the agreement in question was executed, that agreement was void and inoperative as to his rights."

[No. 8218. Department One. February 4, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN H. HEATH, *Appellant*.[1]

INDICTMENT AND INFORMATION—ASSAULT—SUFFICIENCY. A complaint charging that the defendant did assault S. with a deadly weapon, to wit, a shotgun, thereby showing a wilful and abandoned heart, is not sufficient, upon "reducing the charge of assault with a deadly weapon to simple assault," to give the court jurisdiction of the offense of assault, defined by Rem. & Bal. Code, § 2746, to be an attempt, in a rude etc. manner, to unlawfully touch, strike, beat or wound another person, coupled with a present ability to carry such attempt into execution; the charge of "assault" without the statement of any facts being a mere conclusion (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered April 1, 1909, upon a trial and conviction of the crime of assault. Reversed.

*G. C. Israel*, for appellant.

GOSE, J.—A complaint was filed against the appellant in the justice court of Thurston county, the body of which is as follows:

"D. W. Simmons being first duly sworn on oath says that, at Mud Bay, in said Thurston county, state of Washington, on the 10th day of April, A. D. 1908, Jack Heath did commit the crime of assault with a deadly weapon with intent to do as follows: Then and there being, the said Jack Heath did assault D. W. Simmons with a deadly weapon, to wit, a shotgun, thereby showing a wilful and abandoned heart, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington."

The transcript of the record in the justice court recites that, prior to the hearing on the motion of the prosecuting attorney, "that the charge of assault with a deadly weapon be reduced to the charge of assault, it was so ordered." The

[1]Reported in 106 Pac. 756.

complaint, however, remained as stated. The case was thereupon tried to a jury, the appellant found guilty, and his fine assessed at one dollar and costs. Upon an appeal to the superior court, the case was again tried to a jury on the same complaint, the appellant found guilty of assault, and a judgment entered thereon, from which the appeal is prosecuted.

At the trial in the superior court the appellant objected to the introduction of any evidence, on the ground that the complaint does not charge a crime or offense, and at the close of the state's evidence moved for a nonsuit. The objection to the evidence should have been sustained. The complaint was doubtless drawn with the intention of charging the appellant with an assault with a deadly weapon with an intent to inflict a bodily injury where no considerable provocation appears, under the provisions of the code, Rem. & Bal. Code, § 2749. It is obvious that the complaint was insufficient for that purpose.

The constitution, art. 1, § 22, provides that in criminal prosecutions the accused shall have a right "to demand the nature and cause of the accusation against him." The appellant was tried in each instance as for an assault. The code (Rem. & Bal.), § 2746, thus defines this offense: "An assault is an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution." All courts agree that an offense is charged by the statement of the material facts which constitute it, and not by the statement of a mere conclusion of law. The phrase "did assault" is the conclusion of the pleader, and not the averment of a material fact. *State v. Smith*, 74 Ind. 557.

There is no allegation that the appellant attempted to or did touch, strike, beat, or wound another person, nor that he had the present ability to carry the attempt into execution. We have held that it is not necessary to use the words of the statute if others of like import are used, and that

an information which properly charges a consummated assault and battery will support a judgment for assault. *State v. Bohn*, 19 Wash. 36, 52 Pac. 325. The complaint should have alleged that the appellant had the present ability to carry the attempt into execution, either in the language of the statute or in equivalent words. *State v. Hubbs*, 58 Ind. 415. The statute is simple, and its meaning plain, and convictions cannot be permitted to rest upon complaints drawn in utter disregard of the constitutional rights of the accused. No brief has been filed on behalf of the respondent, and we have not therefore had the benefit of the state's view of the case.

The complaint failing to state an offense, the superior court was without appellate jurisdiction. The judgment will be reversed, with directions to dismiss the case.

RUDKIN, C. J., and MORRIS, J., concur.

CHADWICK, J., concurs in the result.

FULLERTON, J. (dissenting)—I am unable to concur either in the reasoning or the conclusion of the majority as expressed in the foregoing opinion. The case itself is unimportant, and so far as it affects the immediate actors, might be allowed to pass without notice, but the principle announced by the decision is, to my mind, far reaching, and such a radical departure from the rules of criminal pleading heretofore thought to be governing in this state, that I am justified in expressing the grounds of my dissent.

The majority hold, as I understand the opinion, that it is no longer sufficient in this state, where the purpose is to charge one person with an assault upon another, to simply use the expression, "did make an assault," but that it is necessary to go further and incorporate in the charge the statutory definition of the offense. This means that instead of alleging, as the pleader has practically done in this instance, "That Jack Heath, in the county of Thurston, in the state of Washington on the 10th day of April, 1908, in and

upon one D.W. Simmons with a deadly weapon, to wit, a shotgun, an assault did make," it is necessary to allege, "That Jack Heath, in the county of Thurston, in the state of Washington on the 10th day of April, 1908, in and upon one D. W. Simmons with a deadly weapon, to wit, a shotgun, did then and there attempt in a rude, insolent and angry manner unlawfully to touch, strike, beat and wound said D. W. Simmons, he the said Jack Heath being then and there coupled with a present ability to carry such attempt into execution."

This holding, I will undertake to show is not only contrary to the rule of the common law, but contrary to the rule of every state of the Union that has passed upon the question, save the state of Indiana. That it is contrary to the common law rule will be at once conceded. From the earliest times it has been held sufficient at common law to charge a simple assault with the words "did make an assault," without further definition or description of the offense or further statement of the facts constituting the assault; the governing principle being that the word "assault" carried with it its definition, and, hence, to allege that one person assaulted another, was to allege that he did those acts which the law defined as constituting an assault. Thus, in the form given by Chitty, quoted by Bishop in his Directions and Forms, at page 102, the allegation charging the assault is in the words "did make an assault," and Mr. Bishop himself, commenting upon the allegations necessary to a complete charge, gives no other essential necessary to a common law charge of simple assault. He says the word "assault" is a "true technical word" and includes the idea of illegality, maliciousness and unlawfulness, and that the indictment need not allege that the act was done maliciously, illegally or unlawfully; although, he adds, the rule might be different where the indictment is under a statute containing these terms. (Bishop's New Crim. Pro. § 5758.) And in Wharton's Precedents, form 214, the allegation charging the offense is made

in the words "did make an assault." It is noticeable here also that the author makes no use of the words "wilfully" or "unlawfully," treating them as nonessential to a sufficient indictment for the offense at common law. So, also, the precedents in the Ency. of Forms, Vol. 2, p. 234.

The authority of these authors is such that nothing further is needed to prove the common law rule. The cases from the American courts where this precise question has been passed upon are not as numerous as one would expect to find them, but such as there are, with the exception mentioned, they follow the common law rule. Thus in *Bloomer v. State*, 3 Sneed (Tenn.) 66, a leading case on the question, the defendant was indicted for assaulting one Minor, the charge being that the defendant at a certain time and place, "did unlawfully make an assault upon the body of one John Minor" and "other wrongs to the said Minor then and there did," etc. It was contended by the defendant that the offense was not sufficiently described, as the indictment did not set out the particular acts constituting the offense, but the state insisted that the words "did unlawfully make an assault upon . . . Minor, *ex vi termini*, meant that the defendant made an attempt or offer to do violence to the person of Minor, coupled with a present ability to do so," and the court so held.

The same question was presented in *Roberson v. State*, 15 Tex. App. 317. Discussing it the court said:

"It is true that the simple allegation that the defendant 'did make an assault' is merely an allegation of a conclusion of law, and ordinarily would be insufficient, the general rule being that an indictment, to be sufficient, must allege the acts or omissions which constitute the offense. . . . But this form of indictment has always been held good at common law, and in our own state, for the offense of an assault, and at the time of the adoption of our several state constitutions was recognized and known as a valid indictment, and must therefore be considered as such within the meaning of the constitution and the provisions of the code of criminal procedure. Were the question as to the sufficiency of such an indictment an

open one, we might hesitate to hold that it was sufficient. It seems to the writer that to so hold would be inconsistent with the general rule applicable to indictments—that the facts constituting the offense must be alleged, and not conclusions of law. But the question is too well settled to be now inquired into, and we therefore hold that there was no error in overruling the defendant's exceptions to the information."

In *State v. Rigg*, 10 Nev. 284, the charge was in the following language:

"The said Peter Rigg, on the 13th day of December, A. D. 1874, or thereabouts, at the town of Winnemucca, in the county of Humboldt, State of Nevada, and before the finding of this indictment, without authority of law and with malice aforethought, did feloniously assault one George Wallace with a deadly weapon, to wit, a knife, in the hand of said Peter Rigg, then and there held, with the felonious intent then and there to kill the said George Wallace, against the peace," etc.

To this it was objected, among other things, that it failed to charge the defendant with a present ability to kill or inflict injury, but the court held the objection to be without merit. The grounds for the holding are not stated, but it could have been on no other ground than the one that the term "assault" includes the idea of present ability to commit it.

In *State v. Burt*, 25 Vt. 373, the indictment was in the following language:

"That Alanson Burt, &c., of, &c., on the second day of January, A. D. 1852, with force and arms, at Newbury aforesaid, in and upon one Andrew Renfrew, then and there being, constable and collector for the town of Newbury aforesaid, under the authority of this state, and in the execution of his said office, then and there also being, an assault did make, and him the said Andrew Renfrew, so being constable and collector as aforesaid, and in the execution of his said office, did impede and hinder in the execution of his said office, contrary to the form, force and effect of the statute, in such case made and provided, and against the peace and dignity of the state."

On demurrer as to its sufficiency the court held the indictment bad as to the statutory crime of hindering and impeding an officer in the performance of his duty, but good as a charge of simple assault. Passing upon the case, the court made use of this language:

"The count in this indictment differs in but two particulars, in its legal effect, so far as I have noticed, from the first count in the indictment, in the case of *State v. Downer et al.* [8 Vt. 424, 30 Am. Dec. 482], which was held good. 1. It does not allege a battery, and that did. 2. This count concludes against the statute, and that did not. But neither of these particulars affect the legal force of the count. If the count would be good, with the addition of the battery, it is equally good for the assault now."

Other cases to the same effect are the following: *Greenwood v. State*, 35 Tex. 587; *Browning v. State*, 2 Tex. App. 47; *Murdock v. State*, 65 Ala. 520; *State v. Boyer*, 70 Mo. App. 156.

Forms in common use elsewhere in the United States, where the assault is charged in connection with an attempt or an intent, will be found in Bishop's Forms, and need no specific reference here. In them it will be found that no other words to charge the assault are used than the words of the common law indictment, namely, "did make an assault."

Our own decisions have heretofore all been in line with the common law rule. While the precise question seems not to have been decided, abundant precedent can be found for the common law method of charging an assault where the assault is coupled with some other element of crime, such as assault and battery, assault with intent to commit murder, assault with intent to commit rape, assault with intent to do great bodily harm, etc. In each of these cases it has always been deemed sufficient to charge the assault in the common law form. Thus in *State v. Largent*, 9 Wash. 691, 38 Pac. 751, where the charge was an assault with an intent to commit murder, no other words were used to define the assault than the words "did make an assault." This case is interest-

ing for another reason. An examination of the briefs of counsel will show that it was urged in that case that the common law form of charging an assault was not sufficient under our statute, but that the allegation should follow the definition of the offense and charge that the defendant in a rude, insolent, and angry manner committed the assault, and that he had the present ability to carry it into execution, but the court ignored this contention, and sent the case back for a new trial on the information as it then stood. To the same purport are the following cases: *State v. Regan*, 8 Wash. 506, 36 Pac. 472; *State v. Ackles*, 8 Wash. 462, 36 Pac. 597; *State v. Clayborne*, 14 Wash. 622, 45 Pac. 303; *State v. McCormick*, 20 Wash. 94, 54 Pac. 764; *State v. Michel*, 20 Wash. 162, 54 Pac. 995; *State v. John Port Townsend*, 7 Wash. 462, 35 Pac. 367; *State v. Elswood*, 15 Wash. 453, 46 Pac. 727; *State v. Priest*, 32 Wash. 74, 72 Pac. 1024; *State v. Adams*, 41 Wash. 552, 83 Pac. 1108. And in the case cited in the majority opinion from this court, it is expressly stated that it is not necessary, in an information charging an assault with intent to commit robbery, to follow the statute and allege that the assault was made in a rude, insolent and angry manner, and that the defendant had the present ability to carry such attempt into execution.

It may be objected to these cases that the words charging the added element in some way support the lack of averment in the part charging assault, but I am unable to see how this can be so. Since the assault is a separate and principal element of the offense, logically it should be charged with all the particularity of a distinct offense, and I opine that if this form of charging an assault had not been sufficient at the common law, the courts would hold it insufficient when charging an assault coupled with an attempt or intent to do some further criminal act. I say that this is the logic of the situation, for otherwise there could be no conviction of a simple assault on a charge of assault and battery, or assault with intent, etc., if the proofs of the

battery or other element failed; this for the reason that if the allegation concerning the battery or other element aid the allegation concerning the assault, the only way to prove the assault would be to prove the battery or other element, and if these proofs failed the whole case must fail.

It may be objected also that the omission to charge the assault to have been "unlawfully" committed is fatal to the complaint in this state, since our statute uses that word in connection with the offense. But it will be noticed that the word is used as a part of the definition of the offense. An assault is an attempt "unlawfully to touch," etc., hence, when it is charged that a person made an assault upon another, it is charged that he did all those acts necessary to constitute an assault. Had the statute made it an offense unlawfully to assault another, the rule might be different, but such is not the statute. Nor is the offense, as defined by statute, so radically different from the common law definition of an assault as to require a different form of alleging the offense. It is not radically different. It is but one of the accepted common law definitions. At the time of the adoption of the code there were a variety of definitions of this offense contained in the reports of cases, and in the works of the law writers, and the code definition was in the interest of definiteness, to make certain that which might otherwise be left uncertain.

The objection made by the majority that the phrase "did make an assault," is the conclusion of the pleader and not the allegation of a fact, is sufficiently answered by the quotation from *Roberson v. State, supra*, and the section cited from Bishop's Criminal Procedure. As Mr. Bishop remarks, if the question were new it might be doubted with some show of reason whether this phrase alone would be adequate, but it is justified by its immemorial use.

The only cases which support the majority opinion are cases from the courts of Indiana. The courts of that state do hold that it is not sufficient to charge an assault in the

form used at common law, but that it must be charged in the words of the statute or in words of similar import. In that state there are no common law offenses, and this rule of pleading is applied in all cases where the assault constitutes an element of the offenses. While the exact words of the statute need not be employed (*Sloan v. State*, 42 Ind. 570; *Knight v. State*, 84 Ind. 73), it is uniformly held that an indictment or information for an assault and battery, or an assault with intent to commit murder, robbery, rape, or bodily injury, must charge, in order to be sufficient, that the assault was committed in a rude, insolent or angry manner, and that the defendant had the present ability to commit the offense, or in words having a similar meaning. *State v. Smith*, 74 Ind. 557; *Adell v. State*, 34 Ind. 543; *State v. Hubbs*, 58 Ind. 415; *Howard v. State*, 67 Ind. 401; *Cranor v. State*, 39 Ind. 64.

Illustrative cases are *Adell v. State*, and *Howard v. State*, *supra*. In the former case the indictment was as follows:

"The grand jurors for the county of Fulton, upon their oath, present that John B. Adell, on the 2d day of March, 1870, at the county of Fulton and state of Indiana, did then and there feloniously, purposely, and unlawfully, make and perpetrate an assault in and upon one Mary Edgington, a woman, with felonious intent to then and there forcibly ravish and have carnal knowledge of said Mary Edgington, against her will, against the peace and dignity of the State of Indiana, and contrary to the form of the statute in such case made and provided."

Commenting thereon the court said:

"In every indictment for an aggravated assault or assault and battery, it is necessary to charge, in the appropriate terms, the minor offense, and then allege the particular felony which the accused intended to commit. If the minor offense is not properly charged, there is no foundation for an allegation of an intent to commit the higher crime. Is it enough for the pleader to say, as in this case, that the defendant did make and perpetrate an assault? Would it do to allege that the accused party did make and perpe-

trate an assault and battery upon a designated person? Must not the pleader set forth the facts which show the accused is guilty of the imputed offense according to its legal definition? It may be that indictments similar in form to this may have been in use in this state prior to the enactment of the statute defining an assault. But since the legislature has furnished a definition of an assault, and thus placed it in the same category with other defined offenses, we must apply, in prosecutions for that offense, the same rule which is applied to prosecutions for other offenses; that is, that the offense must be described according to its statutory definition, by stating all the facts necessary to show that the act is in violation of the statute."

In the second case the indictment charged that the defendant did "wilfully purposely, feloniously and of his malice aforethought, make an assault on one Michael Burns, and then and there with a pistol, commonly called a revolver, which he had and held in his hands, and said pistol or revolver as aforesaid was loaded with gunpowder and a leaden ball, did then and there wilfully, feloniously, purposely, and of his malice aforethought, shoot off said pistol or revolver at and against the said Michael Burns, with intent, then and there and thereby, him, the said Michael Burns, purposely, wilfully, feloniously, and of his malice aforethought to kill and murder," etc. It was held that this indictment was insufficient because it neither stated facts sufficient to constitute an assault or an assault and battery; that it did not charge an assault because it did not contain a charge of present ability to commit the violent injury, and did not charge an assault and battery because there was no charge that the assault and battery had been perpetrated in a rude, insolent and angry manner; in other words, the indictment was held bad because the pleader had not set out in his indictment the acts defined by statute as constituting these offenses. That these indictments would be held sufficient under our practice can hardly be questioned. I think, moreover, they would be held sufficient at the common law, and in every state of the Union outside of Indiana. Yet, notwith-

standing this, the decisions cannot be said to be illogical. If the Indiana manner of charging a simple assault or an assault and battery be sound, clearly it is necessary that the manner be pursued wherever these elements form a constituent part of the offense sought to be charged. This would mean in our state an entire reversal of our system of criminal pleadings, as none of the indictments or informations set out in the cases I have cited from this court would be sufficient.

It may be that the majority do not intend to follow Indiana to the full extent, but if this be so, I ask why follow that state at all? Why not adhere to the common law system so long in vogue? Under this system the pleader follows along a well trodden path, the way is certain and sure, and one needs but take a glance at the Indiana cases on this question to foresee the chaos that will be introduced by a departure from it.

In my opinion the judgment should be affirmed.

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[No. 8247. Department One. February 4, 1910.]

INLAND TRADING COMPANY, *Appellant*, v. U. F. EDGECOMBE, *Appellant*, W. R. CUNNINGHAM, Senior, *Respondent*.[1]

USURY—ILLEGAL EXACTION. A note for $500, given as a bonus or fee for procuring a state contract at a public sale and for furnishing $960 to buy the land, for which latter sum a note with the maximum rate of interest was also taken, is usurious, under Rem. & Bal. Code, §§ 6251, 6255, especially where the value of the service was inconsiderable; since the contract was entire and part of the consideration was illegal, and a contract usurious in part is illegal as to the whole.

CHATTEL MORTGAGES—PRIORITIES—FUTURE ADVANCES. The lien of a senior chattel mortgage on a crop of wheat to secure certain enumerated notes, cannot be extended to cover advances subsequently made for seed, provisions, storage, and harvesting expenses, as against the lien of a junior mortgage, where the mortgage made no provision for future advances or for such items.

[1]Reported in 106 Pac. 768.

CHATTEL MORTGAGES—PROCEEDS—ACCOUNTING—EXPENSE ITEMS ALLOWABLE. Upon an accounting for the proceeds of a crop of wheat delivered by the mortgagor to, and handled by, a usurious mortgagee, he must account for the net proceeds only; and freight, warehouse, storage, and commission charges and expenses, incurred in handling and selling the grain, are properly chargeable against the proceeds; but the mortgagee is not entitled to charges for "insurance" not authorized by the mortgagor or junior mortgagee, nor for "interest" where there was no evidence to show upon what it was based.

Appeals by plaintiff and a defendant from a judgment of the superior court for Spokane county, Warren, J., entered January 28, 1909, upon findings in favor of a codefendant, in an action to foreclose a chattel mortgage. Reversed.

*Adams & Naef*, for appellants.

*Merritt, Oswald & Merritt*, for respondent.

GOSE, J.—The appellant, a junior mortgagee, instituted this action against its co-appellant, the mortgagor, and the respondent, a prior mortgagee, for the purpose of foreclosing a chattel mortgage on a quantity of wheat, alleged to be in the possession of respondent, and to secure an accounting. The respondent answered, admitting the possession of the wheat, setting forth his prior mortgage, the specific indebtedness secured by it, and certain enumerated advances made to the mortgagor subsequent to the execution of his mortgage, and alleging that the security is insufficient to satisfy the mortgage indebtedness and the subsequent advances. The appellant Edgecombe, by way of answer and cross-complaint, alleged, *inter alia*, that the respondent exacted and received a bonus of $500, as a consideration for the note of $960 pleaded in the respondent's answer, in addition to interest on the note at the rate of twelve per cent per annum. The appellant corporation, in its reply, made a like charge of usury. There was a judgment for $134.69, in favor of appellant corporation and against the respondent, from which the former and appellant Edgecombe have appealed.

On the issue of usury the court found:

"That said note of nine hundred and sixty ($960) dollars was given by said defendant Edgecombe and his said wife as a substitute and to take the place of another note for nine hundred and sixty ($960) dollars given by the defendant Edgecombe to the defendant Cunningham on or about the 3rd day of June, 1905, and that there was no other or further consideration for the said note of nine hundred and sixty ($960) dollars, dated June 3, 1905. That the sole and only consideration for the said nine hundred and sixty ($960) dollar note of June 3, 1905, was an advancement by the said W. R. Cunningham, Sr., to the state of Washington on four contracts for the purchase of school land from the State of Washington, which contracts were owned by said defendant Edgecombe. That at the time the defendant Edgecombe signed the said note for nine hundred and sixty ($960) dollars on said June 3, 1905, said defendant Cunningham exacted and received from the said defendant Edgecombe his promise to pay five hundred ($500) dollars as a fee for securing said contracts and furnishing the said nine hundred and sixty ($960) dollars for the benefit of said Edgecombe. That on the said 3rd day of June, 1905, the defendant Edgecombe gave to the defendant Cunningham his promissory note for five hundred ($500) dollars, for the said fee. The defendant Edgecombe has paid to the defendant Cunningham the said note of five hundred ($500) dollars given for said fee as aforesaid."

The finding is in harmony with the evidence of the respondent. The appellant Edgecombe, however, testified that the $500 note was given solely as a bonus or premium for the loan of the $960. It is admitted that the interest rate of the note is twelve per cent per annum. No deduction was made on account of the $500 note. We will consider the case on the assumption that the finding is a correct interpretation of the evidence.

The first question presented for determination is, was the execution of the $500 note usurious. The applicable provisions of our statute are:

"Any rate of interest not exceeding twelve (12) per centum per annum agreed to in writing by the parties to the contract,

shall be legal, and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or other thing in action than twelve (12) per centum per annum." Rem. & Bal. Code, § 6251.

"If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if in any action on such contract proof be made that greater rate of interest has been directly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal, less the amount of interest accruing thereon at the rate contracted for, and the defendant shall recover costs; and if interest shall have been paid, judgment shall be for the principal, less twice the amount of interest paid, and less the amount of all accrued and unpaid interest. . . ." Rem. & Bal. Code, § 6255.

The finding clearly shows that the $500 was exacted for the services of the respondent in procuring the contract and for advancing the $960. A part of the consideration for the $500 was legal and a part illegal. The contract is not separable or severable. Commenting upon the intermingling of legal and illegal considerations, in *Brown v. Nevitt*, 27 Miss. 801, the court pertinently remarked: "It is well settled, that where the transaction is one entire contract, and it is usurious as to a part of it, it is illegal as to the whole;" citing: *Harrison v. Hamel*, 1 Eng. C. L. R. 780; *Jackson v. Packard*, 6 Wend. (N. Y.) 415; *Flemming v. Mulligan*, 2 McCord (S. C.) 173, 13 Am. Dec. 707; *Motte v. Dorrell*, 1 McCord (S. C.) 350, 10 Am. Dec. 675; Chitty, Cont. (6th Am. ed.), 707; *Brigham v. Marean*, 7 Pick. (Mass.) 40; *Loomis v. Newhall*, 15 Pick. (Mass.) 167; *Coulter v. Robertson*, 14 Smedes & M. (Miss.) 18.

In *Sims v. Alabama Brewing Co.*, 132 Ala. 311, 31 South. 35, a like rule is announced in the following language:

"Where the contract is entire, incapable of divisibility, the rule undoubtedly is that a promise to do an act which is illegal or a promise to do a legal act based upon an illegal consideration, is void."

In *Miller v. Life Ins. Co.*, 118 N. C. 612, 24 S. E. 484, 54 Am. St. 741, speaking of usury, it is said:

"That, if it is the purpose of the lender to get more than the lawful rate of interest for loan of money, and if there be a provision, a condition, a contingency, in or connected with the contract by which he may do so, it is usurious."

In *Blake v. Yount*, 42 Wash. 101, 84 Pac. 625, 114 Am. St. 106, this court said:

"Of course, if it appears upon the face of the transaction that there is any trick or device or subterfuge by which the borrower is compelled, in order to get the money to pay a larger amount of interest than is allowed by the statute, the note will be determined to be usurious; . . . ."

In *McNamara v. Gargett*, 68 Mich. 454, 36 N. W. 218, 13 Am. St. 355, the court, discussing the question of public policy, said:

" 'This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy.' "

The same principle is announced in *Missouri K. & T. Trust Co. v. Krumseig*, 77 Fed. 32, and *Brower v. Life Ins. Co.*, 86 Fed. 748.

The respondent, under the finding of the court, has directly received a greater interest than twelve per cent per annum. The statute announces a rule of public policy having for its object the protection of the public against the rapacity of the money lender, and any contract for the payment of a rate of interest in excess of the maximum rate is usurious. We will not overlook the fact that the value of the services of the respondent in procuring the contract was inconsiderable. Practically the only service he could have rendered was to prepare the applications on blank forms furnished by the state. The sale was a public one, open to all bidders. A return is made by a public officer. Neither upon his testimony nor under the finding was there any engagement

to pay any definite sum for the service. The legal and illegal are therefore so blended and intermingled as to be incapable of separation, and the entire note of $500 was usurious.

There was no provision in the respondent's mortgage for future advances. The court allowed him a lien for certain specific sums advanced to the mortgagor subsequent to the filing of the appellant's mortgage. The mortgagor remained in possession and harvested the crop. The theory upon which these claims were given a preference over the second mortgage was that the advances were made for seed, provisions, a storage granary, and harvesting expenses. These items were not included in the respondent's mortgage, and his lien cannot be extended to include them as against the lien of a junior mortgage. As we have pointed out, the respondent's mortgage secured the payment of certain enumerated notes only. In *Dunsmuir v. Port Angeles Gas, W. El. L. & P. Co.*, 24 Wash. 104, 63 Pac. 1095, it was held that the holder of a chattel mortgage who pays delinquent taxes upon the mortgaged property acquires no additional lien thereby.

"A chattel mortgage given to secure a certain indebtedness therein expressed cannot be extended to become a lien for another and different indebtedness, except perhaps by agreement between the parties, and such an agreement cannot be enforced to the detriment of creditors or junior encumbrancers." 6 Cyc. 1020, 1021.

"Debts created, or advances made to a mortgagor, subsequent to the mortgage, cannot be tacked to the mortgage debt, to the prejudice of third persons who have acquired a junior lien on the mortgaged property." *Schiffer v. Feagin*, 51 Ala. 335.

"When, under a mortgage providing for future advances, but leaving it optional with the mortgagee whether he shall make them, they are made after he has been advised that a subsequent mortgage has been given upon the property, his lien for such advances will be postponed to that of the junior incumbrance." *Davis v. Carlisle*, 142 Fed. 106.

See, also, *Weathersbee v. Farrar*, 97 N. C. 106, 1 S. E. 616.

The court found that the appellant Edgecombe delivered the wheat to the respondent, who shipped and sold it. Charges against the wheat were allowed as follows:

| | |
|---|---|
| Interior Bac. charges | |
| Freight to Tacoma | |
| Storage at Tacoma | |
| Commission | $809.82. |
| Insurance | 90.49. |
| Interest | 31.96. |

Appellants contend that none of these charges should have been allowed. The freight, warehouse storage, and commission charges were expenses of handling and selling the grain, and properly chargeable against the proceeds. In other words, on an accounting the respondent can only be held for the net proceeds of the wheat. No claim has been made that the wheat was sold for less than its market value. The interest and insurance items should not have been allowed. There is no finding that they were authorized either by the mortgagor or the junior mortgagee. Nor does the evidence show what the interest charge is based on, or that the insurance was of any benefit to the appellant corporation. *Booth v. Baltimore Steam Packet Co.*, 63 Md. 39.

The case will be remanded with directions to disallow the $960 note and interest thereon, in entering the new judgment, it being extinguished by doubling the $500 note as a credit and disallowing interest, as the statute commands. And with further directions to disallow, as against the appellant corporation all advances made by the respondent subsequent to the execution of his mortgage, excepting the items for warehouse and storage charges, freight and commission; and to disallow as to the appellant Edgecombe, in addition to the credits for usury, the two items consisting of interest and insurance. The appellants will recover costs.

Rudkin, C. J., Chadwick, Fullerton, and Morris, JJ., concur.

[No. 8264. Department One. February 5, 1910.]

ALEXANDER HARSTAD, *Respondent*, v. JACOB O. OLSON *et al.*, *Appellants*.[1]

ACTIONS—SPLITTING CAUSES—SEVERABLE CONTRACTS. A party may sue on a severable contract for all items due when suit is brought, and there is no splitting of causes of action.

CONTRACTS—ENTIRE OR SEVERABLE—PAYMENTS. A contract to clear five acres of land is severable, where the owner agreed to pay for the three first acres $140 per acre, $100 payable when each acre is completed, $75 when the fourth was completed, and balance when all was completed.

JUDGMENTS—BAR—CONTRACTS—PARTIAL PERFORMANCE — RECOVERY ON SEVERABLE CONTRACT. Where a contract for clearing land is severable, an action for the first installment, falling due on completing the first acre, is not a bar to a recovery for the balance.

EVIDENCE—PAROL TO VARY WRITING. Evidence to show that a contract had been partly performed, and part payment made before it was reduced to writing, is not inadmissible as varying by parol the terms of a written agreement.

ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING—SEVERAL CONTRACTS. In an action to recover on a severable contract for clearing land, recovery cannot be had for the reasonable value of the entire work upon defendants' breach of the contract and refusal to allow plaintiff to perform, where plaintiff had pending another action to recover the first installment due on completing the first acre, or had been paid therefor.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 1, 1909, upon findings in favor of the plaintiff, in an action on contract, after a trial before the court without a jury. Reversed.

*Martin J. Lund*, for appellants.

*Frank C. Park*, for respondent.

CHADWICK, J.—In February or March, 1907, plaintiff entered into a verbal contract with defendants, whereby he agreed to clear a certain five-acre tract of land, and entered

[1]Reported in 106 Pac. 741.

upon the performance of the work. On July 7, 1907, the parties reduced their contract to writing. The writing covered the whole five acres and made no reference to the work already done. On or about October 15, 1907, defendants objected to the manner in which plaintiff was performing the work, and ordered him to quit. He did so, but thereafter offered to complete the contract according to its terms. His offer was refused. On September 28 plaintiff brought an action against defendants for the value of the work performed between March and July 7, the time the written contract was entered into. The suit was begun before a justice of the peace and it was appealed, and it is now admitted that it resulted in a judgment against defendants in the sum of $55 over and above the payments which had been previously made, amounting to $89.50.

It was the theory of the trial judge that, the defendants having breached the contract, the plaintiff might recover for the reasonable value of his work, and that the suit brought for the work done prior to July 7 was not a splitting of his cause of action, as is most strenuously contended by counsel for defendants. As we understand the rule, when a contract is severable, a party may sue upon all items due at the time suit is brought. 1 Ency. Plead. & Prac., 152. The contract (and we conceive it to be immaterial whether we consider the oral or written contract, for there is nothing to show that they differed in their terms) provided:

"Second party agrees to pay to A. Harstad for the three first acres one hundred and forty dollars ($140) per acre, in the following terms. One hundred ($100) to be paid when first acre is completed in accordance with this contract, one hundred ($100) when second acre is completed, and one hundred ($100) dollars when third acre is completed; $75 when the first acre of the last two in this contract is completed and the balance in full when the work is completed."

We think this contract is severable, and we will not presume from the mere fact that a suit was brought that there was anything claimed to be due other than one or more of the

stipulated payments. The court found, upon a clear conflict of the evidence, that plaintiff had done seven hundred and nine hours work upon the five acres, and that it was of the reasonable value of $212.70, to which he added $97 for materials and money expended, making a total of $309.70. He allowed a lien for this amount. Defendants have appealed.

It was the contention of appellants throughout the trial that the respondent was claiming a double recovery and that the decree of the court made such allowance to him. We have shown that we do not agree with his theory that the suit in the justice court barred a recovery of the balance of whatever might be his due. But we do think the court was in error when he denied appellants the right to show that the contract had been partially performed when the contract was reduced to writing. The theory of respondent is that such evidence would vary a written contract by parol. This is not so. There was but one subject-matter, the clearing of five acres of land. This was stated in the written contract, but it cannot be denied that a part of the work had been done, and anything that would show a partial payment, whether before or after the contract was reduced to writing, was material, and has never, so far as we have been able to inform ourselves, been held to be a variation of the terms of a written contract by parol. It is not a question of contract —upon that the parties are agreed—but of payment, or a bar to recovery. This may be proved by showing another suit pending for a part of the entire sum due on the contract. Finding then, that the first suit was based upon the right to recover for clearing the first acre, the only question is, did the trial court consider and allow for the first acre in the second suit. As we have said, the record shows that appellants had paid respondent $89.55, and that a judgment had been rendered for $55.05, a total of $144.55. It also shows that the value of the whole work, including the first

acre, was the subject of the court's inquiry in this case. Respondent testified:

"Q. Now, Mr. Harstad, how many hours work did you perform on that clearing for Mr. Olson—that five acres? A. How many hours? Q. Yes, sir, how many hours personal labor? A. Seven hundred and nine, I think."

The trial judge filed a memorandum decision in which it clearly appears that he considered and allowed a recovery for the work done on the whole five acres. After basing his conclusion upon the number of hours' labor performed, he further justifies it by reference to the testimony of the witnesses as to the manner of the work done, without reference to the time employed. He says, for instance, the appellants' witness Linestad testified that the value of the work upon the first acre was $100, upon the second acre $40, etc.; that Stein, appellants' witness, testified that the value of the first acre was $100, and that Alexander, a witness for the appellants, testified that the value of the work performed upon the first acre was $75, etc. He then adds the figures furnished by these witnesses, and brings about a result substantially as he had found it. It seems too clear for further argument that respondent cannot recover for the whole five acres in this suit when another action was pending for a part of the amount due. Upon the theory, then, that the contract is severable, and that respondent has been paid or has a suit pending for the first acre, the judgment of the lower court will be reduced in the sum of $144.50.

This case will be remanded with instructions to the lower court to enter judgment accordingly. Appellants will recover their costs on appeal.

RUDKIN, C. J., FULLERTON, and GOSE, JJ., concur.

[No. 8598. Department One. February 5, 1910.]

ELMIRA M. WHITAKER, *Executrix etc. Relator*, v. C. W. CLAUSEN, *State Auditor, Respondent*.[1]

PENSIONS—PARTIES ENTITLED—DEATH OF APPLICANT PENDING APPLICATION. Rem. & Bal. Code, § 8923, granting pay for services performed by the Indian war veterans is a gift in the nature of a pension, limited by its terms to the veteran in *propria persona*, and in case of his death pending his application, payment cannot be made to his heir or personal representative; since no provision is made therefor (RUDKIN, C. J., dissenting).

Application filed in the supreme court January 20, 1910, for a writ of mandamus to the state auditor to secure a warrant for an Indian war veteran's claim. Denied.

*T. M. Vance*, for relator.

*The Attorney General*, for respondent.

CHADWICK, J.—The legislature of 1909 passed an act for the relief of Indian War veterans. Laws 1909, p. 862, ch. 238, § 3 (Rem. & Bal. Code, § 8923), is as follows:

"The claim for such services, verified by the claimant, shall be presented to the adjutant general, who shall, without additional cost to the state, examine and pass upon the same, and may require additional corroborative evidence in support thereof; and he shall prepare, certify and file with the state auditor proper vouchers showing the amount payable to the claimant under the provisions of this act. Thereupon the state auditor shall issue his warrant for the amount found due to the claimant: Provided, that nothing in this act shall be construed to authorize the payment of any claim to any heir or beneficiary of the claimant for services during the Indian wars."

These facts are not disputed: On June 7, 1909, L. C. Whitaker made affidavit of his claim under the foregoing statute, and filed it with the adjutant general of the state. He died on June 16. On June 21 the adjutant general ap-

[1]Reported in 106 Pac. 745; 107 Pac. 832.

proved his claim for a part of the amount demanded, and certified his findings to the state auditor, the respondent here. The respondent, having been informed of the death of the claimant, refused to draw a warrant for the amount upon the demand of the relator, who is executrix of the will of L. C. Whitaker. Respondent justifies under the provisos of the section quoted, claiming that by the terms of the act he cannot deliver the warrant to any heir or beneficiary of the deceased; or, in other words, that the grant was personal, and the obligation on the part of the state ceased with the death of the claimant.

It is the contention of the relator that, while an heir or beneficiary could not initiate the claim, the right to the warrant or payment had become vested at the time of Whitaker's death, and that the ministerial act of drawing the warrant may be compelled by his personal representatives. The remedy, if any, is to be determined by reference to the nature and character of the legislative act. Legislation for the relief of those who have engaged in the public defense has never, so far as we have been able to discover, been put upon the ground of contract, but it has been considered as a bounty or voluntary recognition of patriotic service.

"The pension granted by the government is a matter of bounty. 'No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion. *Walton v. Cotton*, 19 How. 355.' *United States v. Teller*, 107 U. S. 64, 68." *Frisbie v. United States*, 157 U. S. 160, 166.

The only source of authority to which we can look with any assurance is the construction of the pension laws of the country. The later laws have made provision for the lodgment of the government's bounty in case of the death of the one entitled thereto. But it was not so in some of the earlier enactments. In *Oo-la-ya-tah's Case*, 7 Opinions of Attorneys General 619, Hon. Caleb Cushing, then Attorney General of the United States, in considering the then present tendency

of legislation in behalf of those who had been engaged in military service, and, in case of their death, in behalf of their widows and orphans, said:

"Now, on review of all these acts, it will be found that, in certain cases, or classes of cases, Congress has made express provision for widows, children, administrators, heirs at law, or other representative persons, and, in such cases, has, in its discretion, defined who such representative person shall be. In other cases or classes of cases, Congress has made mention of the original party alone, abstaining from all reference to representative persons. If the question were, in all its parts, one of new impression, it would seem to me that, as a general rule in the construction of the pension acts, where they omit to mention representative persons, it was not intended to provide for them. I do not mean to say that a pension, or arrears of pension, already certified, or even adjudicated, should be withheld from representative persons. That is a special question. What my proposition affirms is, that if the law in terms provide only for the pensioner himself by description of a class of persons, and he die without having applied for and obtained an adjudication in his favor, then, by proper construction of the statutes, the right of pension dies with him. It is not properly belonging to the deceased, and as such descendible to or distributable among representative persons, unless made so by express enactment."

In the case of *Arrearages of Pensions*, 7 Opinions of Attorneys General, page 717, the same officer said:

"I concluded, in the first place, that invalid pensions, which belong to the subsisting military system of the Government, are only claimable by the party, or such persons representing him, widow or children, as may have been expressly and specifically provided for by the statute."

See, also, *Unclaimed Revolutionary Pensions*, 8 Opinions of Attorneys General, 198.

It is the contention of the relator that her testator bore the same relation to the state as one who has fully complied with the land laws bears to the United States government. There is no analogy between the cases. Theoretically, at least,

the Federal government has given its land in consideration of certain acts to be performed or money paid, and it has been held that, upon full compliance, the settler can compel the issuance of a patent, upon the theory that he has a vested right in the land. But vested rights never grow out of gratuitous favor. Only those who can ground their claims in some contract, express or implied, or upon some right guaranteed by the common law, are heard to assert such rights. Neither element exists in this case. But even the application of the land laws does not aid the relator, when applied to a state of facts similar to those we have to consider. *Campbell v. Wade*, 132 U. S. 34.

Whatever may have been the obligation of the United States government to pay its Indian War debt (the record shows it to have been met, in part, at least,) there was no obligation on the part of the state of Washington to pay any part of it. The act of 1909 is a gift, limited by its terms to the veteran in *propria persona*. In the case at bar Whitaker had done nothing to secure his right, other than to file his claim. It was not even allowed in his lifetime, and as against the manifest intent of the law to make the gift personal, the courts are powerless to extend the state's bounty to the heirs or beneficiaries of a deceased person.

The writ is denied.

FULLERTON, MORRIS, and GOSE, JJ., concur.

RUDKIN, C. J. (dissenting)—A literal construction of the proviso to section 3 of the act under consideration (Laws 1909, p. 862, ch. 283, § 3; Rem. & Bal. Code, § 8923), would not permit of the payment of a warrant to the heir or other beneficiary of a deceased claimant, although the claim was presented, audited, and allowed during his lifetime. I do not think that such literal construction was intended. The purpose of the proviso was doubtless to prevent the heirs of deceased veterans from preferring claims against the state where the veteran himself presented no claim during his life-

time. In enacting the proviso the legislature did not have claims such as this in contemplation; and if it had, I do not think that it would have provided for their rejection. The question is one of little moment, as it will probably never arise again, but the act was passed in recognition of a moral obligation resting on the state as successor to the territory, and I think a fair and reasonable construction of its provisions would include and authorize the payment of the claim in suit. I therefore dissent.

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[No. 8547. Department One. February 5, 1910.]

ALEX. BRIDGE, *Appellant*, v. CALHOUN, DENNY & EWING, INCORPORATED, *Respondent*.[1]

VENDOR AND PURCHASER—CONTRACT—REJECTION BY OWNER—RECOVERY OF EARNEST MONEY. The action of the vendor in proffering a deed, with notes and mortgage for the deferred payments, which provided for attorney's fees and that the whole sum should become due on failure to pay an installment of interest, is a refusal of the contract made by the agent subject to his approval, where the agent's contract fixed the time, amount, and interest of the deferred payments without any provision for attorney's fees or maturity of the notes in case of default; hence the vendee could recover earnest money to be returned if the vendor did not approve the sale.

ESTOPPEL—PLEADINGS—VENDOR AND PURCHASER. In an action by a vendee to recover earnest money paid, the original complaint alleging defects in the title does not estop the plaintiff from alleging and proving that the owner never consented to the sale, made by defendant as agent subject to the owner's approval.

APPEAL—BOND—FORM AND AMOUNT—DISMISSAL. An appeal bond, insufficient as a supersedeas bond, is not ground for dismissal of the appeal, where it was not conditioned to operate as an appeal and a supersedeas, and no attempt was made to stay the judgment, although it contained some language ordinarily used in a supersedeas bond, which was surplusage and of no evident intent or value.

[1]Reported in 106 Pac. 762.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 9, 1909, upon findings in favor of the defendant, in an action on contract tried before the court without a jury. Reversed.

*Geo. H. Bailey* and *Frank E. Green*, for appellant.

*John P. Hartman*, for respondent.

Morris, J.—On February 14, 1907, the parties hereto entered into a contract for the purchase and sale of certain real property then owned by John W. Lewis, residing at San Francisco, the respondent here representing the owner. The contract provided for a cash payment, and fixed the time and amount in which deferred payments should be made, and that they should bear interest at six per cent, payable semiannually. An abstract was to be furnished, and it was then stipulated that the contract was to be approved by the owners, and in case of such approval the purchaser would forfeit the cash payment, which was to be regarded as earnest money in case he did not proceed farther in accordance with the terms of the contract. The contract was not approved by the owner in the blank space provided therein, nor was his signature attached thereto in any manner except as it was made in the first instance by respondent as his agent.

The respondent prepared a deed and forwarded the same to the owner for execution, and on April 22 the deed, duly executed, was tendered appellant, together with four notes representing the deferred payments, and a mortgage to secure the same. The first three of these notes provided for an attorney's fee of $500 in case of suit, the fourth provided for an attorney's fee of $1,000, and in each there was a clause providing that, in case the interest was not paid semiannually, the whole sum of both principal and interest should immediately become due and collectible at the option of the holder of the note. The mortgage contained a similar

provision. The appellant refused to execute these notes and the mortgage, claiming the provision for an attorney's fee was not in accordance with his contract, and subsequently brought this action to recover the cash payment; and in order to state a cause of action against respondent, who was only agent of a known principal, alleged that the owner never consented to nor approved the sale. The judgment of the lower court was against him, and he appeals.

In order to bind appellant to the fulfillment of his contract, it was necessary that Lewis, the owner, should approve the contract as made for him by his agent; and the whole case hinges on whether the proffer of the deed with a demand for the execution of the notes and mortgage constituted an approval. We think not. There was no provision in the contract for the payment of $500 or $1,000 as attorney's fee. Neither was there any agreement whereby, in case of the failure to pay any installment of interest when due, the whole sum represented by the respective notes should immediately become due. These were certainly new and material stipulations; and when the owner demanded a compliance therewith, it was in effect a refusal of the contract as made by his agent, and the proffer of a sale upon new conditions. It is well recognized, when a party to a contract is to become bound by his acceptance thereof, that any change in any of the material stipulations or the injectment of new stipulations, is a rejection of the contract as offered, and the proffer of a new contract, to which the other party is not bound until his acceptance thereof. If we accept respondent's contention that the contract provided for deferred payments at fixed times, it must be assumed that such payments were to be represented by notes and mortgage to secure the same. Such assumption would not provide for the payment of a fixed sum as attorney's fee. Neither would it authorize the insertion of the clause providing for the advancement of the maturity of the notes in case of default in the payment of interest. All notes do not contain

like provisions, and notes with such stipulations could not become part of any contract until there was a binding and enforceable agreement to that effect.

Respondent contends that it is shown by the record that the contract was subsequently modified in regard to the time of the deferred payments, by respondent and Strang, acting as agent for appellant, and that this modification was assented to by Lewis, and that he tendered a proper performance of the modified contract. Assuming again that such might be the fact, there is no evidence of any modification suggesting the insertion in the contract, or the acceptance by appellant, of any such stipulation as those under discussion. Neither does the fact that in his original complaint he sought to show defects in the title, defeat his right to now contend that the terms demanded of him were not the ones agreed upon. A party to an action is entitled to any defense, either of fact or law, which may be created out of the circumstances surrounding the situation, whether discovered by himself or the attorneys whom he has employed to represent his interest, except in so far as the proper application of the rules of estoppel may deny such a plea, and there is nothing here upon which any estoppel can be predicated.

Respondent moves to dismiss the appeal upon the ground that the bond is conditioned both as a supersedeas and appeal bond and is in an insufficient amount. We do not find the bond so conditioned as to operate both as a supersedeas and appeal bond. The bond contains some language ordinarily used in a supersedeas bond, but there is no attempt made to stay the judgment, and such words are mere surplusage and of no evident intent or value. The motion to dismiss is denied, and the judgment is reversed.

RUDKIN, C. J., FULLERTON, CHADWICK, and GOSE, JJ., concur.

[No. 8508. Department One. February 5, 1910.]

ARTHUR W. GOUGH *et al.*, *Respondents*, v. L. W. CENTER, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—NONSUIT—DEFECTS SUPPLIED. In an action of ejectment, error, if any, in refusing to direct a nonsuit for failure to prove that the defendant was in possession, is cured, where the defendant's testimony in his own behalf supplied the defect.

DEEDS—INTEREST CONVEYED—ESTOPPEL—VENDOR AND PURCHASER—AFTER-ACQUIRED TITLE—MORTGAGE FORECLOSURE. Under Rem. & Bal. Code, § 8765, and independently thereof, an after-acquired title inures to the benefit of the grantee, and this rule applies to titles acquired through mortgage foreclosures.

ESTOPPEL—STIPULATIONS—EFFECT. A stipulation that a mortgage was given, judgment of foreclosure entered, and a sale had and deed executed thereunder, estops the party from asserting want of jurisdiction to render the judgment.

MORTGAGES — FORECLOSURE — DEED — AFTER-ACQUIRED TITLE. The mortgagor's after-acquired title inures to the benefit of the purchaser at the mortgage foreclosure, although the then owners of the title were not made parties to the foreclosure suit.

EJECTMENT—DEFENSES—ALIENAGE—BURDEN OF PROOF. In ejectment, the burden is upon defendant to establish the defense that an after-acquired title, inuring to the benefit of the plaintiff, was lodged in an alien incapable of acquiring real property in this state.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered September 10, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action of ejectment and to quiet title. Affirmed.

*A. H. Garretson* and *Jesse Thomas*, for appellant.

*Frank D. Nash*, for respondents.

RUDKIN, C. J.—This was an action of ejectment to recover possession of certain real property in Pierce county, and to quiet title thereto against the claims and demands of the

[1]Reported in 106 Pac. 774.

defendant, and all persons claiming or to claim by, through or under him. The plaintiffs deraigned their title as follows: The land is in an odd section, and lies within the place limits of the grant to the Northern Pacific Railroad Company, under the act of Congress of July 2, 1864, and the joint resolution of May 31, 1870. On the 30th day of December, 1874, the Northern Pacific Railroad Company conveyed the land by warranty deed to the Tacoma Land Company, a corporation. On May 15, 1885, the Tacoma Land Company conveyed by warranty deed to R. F. Radebaugh. On April 8, 1891, Radebaugh and wife mortgaged the land to the Mason Mortgage Loan Company to secure a loan of $2,000, the mortgage containing the following granting clause: "Do grant, bargain, sell and convey unto the said party of the second part, its successors and assigns forever, all the following described real estate." This mortgage and the note secured thereby were assigned by the mortgagee to one Woodward, and Woodward foreclosed the mortgage, by action in the superior court of Pierce county against Radebaugh and wife. The property was sold by the sheriff to the plaintiff in the execution, who assigned his certificate of purchase to one Augusta Elterich; and the sheriff's deed issued to the assignee of the certificate, after the expiration of the redemption period. On January 31, 1907, Elterich conveyed by warranty deed to Arthur W. Gough, one of the plaintiffs in this action. On February 15, 1907, Gough and wife, by warranty deed, conveyed a portion of the premises to the plaintiff R. B. Pierce. Thereafter Mrs. Gough died, intestate, and the other plaintiffs are her heirs at law.

Long after the conveyance from the Northern Pacific Railroad Company to the Tacoma Land Company, the secretary of the interior held that this particular land was excepted from the grant to the railroad company, by reason of a preemption filing made by one Martindale in the year 1869, and the railroad selection was thereupon cancelled. Thereafter, and on the first day of April, 1899, the United States

patented the land to the Tacoma Land Company, under the act of Congress of March 3, 1887, by reason of its purchase in good faith from the railroad company. On the foregoing facts, the court directed a judgment in favor of the plaintiffs, and the defendant has appealed.

Many errors are assigned in the appellant's brief on rulings made by the court during the progress of the trial in respect to the pleadings, but in the argument before this court all such assignments were waived, and the appellant based his right to a reversal on the refusal of the court to direct a nonsuit at the close of the respondents' testimony. One of the grounds urged in support of the nonsuit was the failure of the respondents to prove that the appellant was in possession of the land at the time of the commencement of the action. If we assume that there was a failure of proof, and that such failure was fatal to the respondents' right of recovery, the defect was supplied by the appellant, who testified in his own behalf that he was then in possession and had been for several years previously.

The only remaining question is the sufficiency of the respondents' proof of title. Rem. & Bal. Code, § 8765, provides as follows:

"Whenever any person or persons having sold and conveyed by deed any lands in this state, and who, at the time of such conveyance, had no title to such land, and any person or persons who may hereafter sell and convey by deed any lands in this state, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a title to such lands so sold and conveyed, such title shall inure to the benefit of the purchasers or conveyee or conveyees of such land to whom such deed was executed and delivered, and to his or their heirs and assigns forever. And the title to such land so sold and conveyed shall pass to and vest in the conveyee or conveyees of such lands, and to his or their heirs and assigns, and shall thereafter run with such land."

This rule prevails generally, independent of statute. 2 Devlin, Deeds (2d ed.), § 944 *et seq.* A title obtained

through mortgage foreclosure is no exception to the rule. *People's Savings Bank v. Lewis*, 37 Wash. 344, 79 Pac. 932; Jones, Mortgages (5th ed.), § 679; Wiltsie, Mortgage Foreclosure, § 391.

We will now refer briefly to the reasons assigned by the appellant why the rule should not obtain in this case. It is first contended that there was no proof that process was served on the defendants in the foreclosure action, or that the court had jurisdiction of the parties. This objection is not open to the appellant at this time. He stipulated that a mortgage was given, that a judgment of foreclosure was entered, that a sale was made by the sheriff and a deed executed, and this stipulation carried with it the implication that all such proceedings were regular and legal. If he desired to object to the jurisdiction of the court to enter the judgment, he should have raised that question at the proper time and in the proper forum. A party will not be permitted to stipulate that a judgment was rendered and thereafter question the jurisdiction of the court to render it, unless he expressly reserves that question.

It is next contended that the United States was not a party to the foreclosure, that the mortgagors had no title, and that by reason of these facts the foreclosure was void. We apprehend a deed is always void, or at least ineffectual, where the grantor has no title at the time of its execution, but this is no objection to the application of the rule that an after-acquired title passes by estoppel. Indeed, the rule could have little or no application if the contention of the appellant is sound.

It is lastly contended that there is no proof that the holder of the railroad title, at the time of the issuance of the patent to the Tacoma Land Company, was a citizen of the United States, or had declared her intention to becoming such. The respondents are not claiming that the patent issued to the wrong person, or that the original patentee holds the title in trust for them by reason of that fact. If they were, it

might be incumbent on them to show that their grantor was qualified to take under the act of Congress. They base their right or title on the general ground of estoppel above set forth, and if there is any reason why that general rule of law should not obtain here, the burden is on the appellant to show that fact. An alien cannot hold land in this state, except acquired in a certain way, nor could such a one enforce the specific performance of a contract of sale; for a court of equity will not aid him in obtaining a title which he cannot hold. Yet it has never been deemed necessary in such actions to allege or prove that the plaintiff is a citizen of the United States. A corporation, the majority of whose stock is held by aliens, cannot exercise the right of eminent domain, but the petitioner in such cases is not required to allege or prove that a majority of its capital stock is held by citizens. *State ex rel. Forney v. Superior Court*, 55 Wash. 215, 104 Pac. 200. So in this case, if the after-acquired title would not inure to the benefit of the respondents' grantor, if she were an alien—a question upon which we express no opinion—the burden was on the appellant to show the fact of alienage.

We are therefore of opinion that respondents established a clear title to the property in controversy, and that the judgment of the court below should be affirmed. It is so ordered.

FULLERTON, CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8518. Department One. February 5, 1910.]

MARC SODERBURG, *Appellant*, v. JOE WELLS, *Respondent*.[1]

MASTER AND SERVANT—SAFE PLACE—INSPECTION—DUTY OF SERVANT—INSTRUCTIONS. Where a brick mason was injured by the fall of a projecting wall upon which he was set to work, the first course of the projection having been laid by other masons as a stretcher course instead of a header course, he cannot recover because of the employer's duty to furnish him a safe place in which to work, and failure to give notice of the danger, if by the exercise of reasonable care he would have discovered the defect; and instructions sufficiently cover the point where the jury are told that he had a right to assume that the place for work was reasonably safe, and was not bound to anticipate danger or make an inspection, in the absence of knowledge of the defect or such notice as would lead him in the exercise of due care to such knowledge.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered June 2, 1909, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained by a brick mason in the fall of a wall. Affirmed.

*M. H. Ingersoll*, *Reynolds*, *Ballinger & Hutson*, and *Bates*, *Peer & Peterson*, for appellant.

*Hudson & Holt*, for respondent.

RUDKIN, C. J.—On and for some time prior to the 21st day of July, 1908, the defendant was engaged in the construction of the armory, at Tacoma, under contract with the state. The plaintiff was in his employ as a mason or bricklayer. On the above date the brick wall on the 11th street side of the building had been constructed to a height of from 25 to 30 feet above the street level, and was thirteen inches in thickness at the top. Two projecting courses of brick had been laid on the wall, the first or lower course projecting two inches beyond the outer surface of the wall, and the

[1]Reported in 106 Pac. 751.

second projecting two inches beyond the first. The plaintiff, who had been working on another part of the building, was directed to lay a third course on the wall, projecting two inches beyond the second. There being no scaffold to support him, the plaintiff was compelled to stand on the top of the brick wall while performing the duty assigned him. After he had laid a few brick he attempted to step from the wall onto the joist within, and as he did so the wall gave way beneath him, precipitating him to the street below and causing the injury for which a recovery is here sought. The jury returned a verdict in favor of the defendant, and from the judgment entered on this verdict the plaintiff has appealed.

The only errors assigned arise out of the giving and refusing of instructions, and a brief statement of the grounds of negligence upon which the appellant relies becomes necessary to a proper understanding of the questions thus presented. In laying the projecting courses of brick, to which reference has been made, the first course was laid as a stretcher course—that is, the brick were laid lengthwise along the wall. The second projecting course was a header course—that is, the brick were laid crosswise of the wall. The appellant offered testimony tending to show that it is customary in laying projecting courses of brick, where the courses project as much as two inches, to lay the first course as a header, and that a wall is dangerous where the first course is laid as a stretcher. On this testimony, the appellant contended that he had a right to rely upon this custom; that it was the duty of the respondent to notify him that the courses were not laid in the usual and customary way, and that a failure to do so was negligence. There was testimony to the contrary, but the court is not concerned with that question. On the issue thus presented the appellant requested the following instructions, which the court refused and allowed an exception:

"If you find from the evidence that in building projecting courses of brick upon a wall it was the custom of builders,

when the projections were two inches, to build the first projecting course as a 'header' course; and if you further find that the plaintiff did not know that the first projecting course described in the evidence was built as a stretcher course, and such construction was not plainly visible to him at the place in which he was directed to work, he was not bound to examine or inspect such first projecting course to see if it was built as a header, but he had the right to assume that it was built in the usual manner.

"You are instructed that if you find from the evidence that there is some established custom among bricklayers regarding the manner of constructing the first projecting course in brickwork, where the projecting is as great as two inches, and you further find that the first projecting course referred to in the testimony was not according to such custom, and by reason thereof made it more dangerous to persons working on said wall, then it was the duty of the master to warn the servant of such construction if the same was not open, obvious and apparent to the servant from his working place, and the master's failure so to do, under such circumstances, would constitute negligence."

The following instructions were given by the court, to which the appellant excepted:

"Now in determining whether the defendant was guilty of negligence in failing to notify the plaintiff of that fact, you are to apply the same rule. If you find that an employer acting with reasonable prudence would have given such notice, then you may find that the defendant was guilty in that respect. But if you find that an employer acting with reasonable prudence would not have given such notice, then you must find that the defendant was not negligent in that respect, and if you find that the defendant was not negligent in that respect you could not, of course, bring any verdict based on any negligence that does not exist or that you do not find exists.

"Even though you should find that the wall was improperly constructed, even though you should further find that notice should have been given to the plaintiff of the nature of the lower course of the projection, you should not find, even then, for the plaintiff, if it appears to you from the evidence that the plaintiff ought to have known the nature of the

lower course of the projection. Even where an employer has been negligent, if an employee knows of that negligence, knows he has been negligent, and knowing such fact, continues to work without making complaint as to the condition, the employee is held to have assumed the risk; and in determining whether the plaintiff in this case assumed the risk or not you should not only hold him charged with what he actually knew, but you should hold him charged with what he might with reasonable diligence have known. So that among other questions submitted to you, is the question of whether or not the plaintiff ought not, in the exercise of reasonable diligence, to have known that this lower course was a stretcher course, and if you find that he ought to have so known, your verdict should be for the defendant."

Also the following additional instructions not excepted to:

"A servant working upon the construction of a building at a place designated by the master or his foreman, has the right, in the absence of knowledge to the contrary, and in the absence of such notice as would lead him in the exercise of due care and prudence to such knowledge, to assume that the place of work is a reasonably safe one for that character of work. The servant is not bound to anticipate any defect or danger in the place of his work, caused or committed by the negligence of the master or his foreman, in the absence of knowledge on the part of the servant or notice which would lead him in the exercise of care and prudence, to such knowledge. . . . It was the duty of the defendant or his foreman, if he knew of the negligent or defective construction, to warn plaintiff of the condition of the wall and the danger to be apprehended from its condition, if any, before directing plaintiff to go upon the wall, unless the condition of the wall was such that the plaintiff, in the exercise of ordinary prudence, ought or should have known of its condition. And one matter that you are entitled to consider in determining what knowledge ought to be imputed to the plaintiff is his experience in the business in which he was engaged at the time of the accident."

Before examining these instructions, it may be well to ascertain the rule of law applicable to the question before the trial court, and to measure the instructions complained

of, in the light of that rule. We must look to the conduct of the average prudent man for the standard of due care, and by that standard the duties and obligations of both the master and the servant must be measured and determined. The rule that the master must furnish the servant with a safe place to work, and with safe instrumentalities, is well and firmly established, but whether that duty is performed well or ill by the master, if the failure of the servant to exercise reasonable care results in his injury he cannot recover.

In discussing the safe place doctrine, in *Borden v. Daisy Roller Mill Co.*, 98 Wis. 407, 74 N. W. 91, 67 Am. St. 816, the court said:

"In the discussion and decision of this case the rule has been kept clearly in mind that a servant is not obliged to search for defects in instrumentalities furnished for his use, but may rely on the duty of the master to see that they are reasonably safe; yet such rule does not militate at all against that other rule, just as well settled in the law of negligence, that the master may rely on the duty of the servant to observe all defects and dangers which reasonable attention to the work in hand will generally disclose to a person of ordinary intelligence and experience in such work."

In *Illinois Cent. R. Co. v. Sanders*, 58 Ill. App. 117, the court said:

"A man cannot decline to see, and then hold the master liable, excusing his own negligence by saying that he was under no primary obligation to investigate."

In *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355, the court said:

"While the employee may repose confidence in the prudent and cautious adherence to duty by the employer, yet, he may not repose that blind confidence in the performance of the employer's duty which fails to observe the patent defects which an ordinary observation of the employee's duty would readily disclose."

In *Chesson v. Roper Lumber Co.*, 118 N. C. 59, 23 S. E. 925, the court said:

"The servant is culpable if he fail to discover such a defect as would have been apparent, without a thorough examination, if he had used ordinary diligence to discover it."

Our own decisions are in entire harmony with this rule. *Jennings v. Tacoma R. & Motor Co.*, 7 Wash. 275, 34 Pac. 937; *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679. Measured by this rule, wherein are the instructions given by the court deficient? Wherein do they differ from the instructions requested by the appellant? The court instructed the jury that a servant working upon the construction of a building at a place designated by the master or his foreman has a right to assume that the place of work is a reasonably safe one for that character of work, and that the servant is not bound to anticipate any defect or danger in the place of his work caused or committed by the negligence of the master or his foreman. These statements are only qualified by the expression, "In the absence of knowledge to the contrary and in the absence of such notice as would lead him in the exercise of due care and prudence to such knowledge." The court did not tell the jury, in so many words, that the appellant was not bound to examine or inspect the wall, but did tell them that he had a right to assume that the wall was safe, unless he had knowledge or notice to the contrary. These instructions clearly did not relieve the master of any duty imposed upon him by law, nor did they impose upon the servant any duty or burden not sanctioned by law.

We are, therefore, of the opinion that the instructions complained of were in harmony with the law, and that no error was committed in failing to give other instructions setting forth the duties of the master in different language. If the instructions requested were more favorable to the appellant than those given—and we do not so consider them—they were not in harmony with the authorities above

cited. Finding no error in the record the judgment is affirmed.

MORRIS, CHADWICK, FULLERTON, and GOSE, JJ., concur.

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[No. 8540. Department One. February 5, 1910.]

## H. N. SWARTSWOOD *et al.*, *Appellants*, v. J. O. NASLIN, *Respondent*.[1]

FRAUDS, STATUTE OF—EMPLOYMENT OF BROKER—MEMORANDUM—SUFFICIENCY. A memorandum of an agreement for the employment of a broker to sell real estate is insufficient, under the statute of frauds (Rem. & Bal. Code, § 5289), where it fails to name any broker or agent and employs none, describes no real estate, and contains no agreement for compensation.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 5, 1909, dismissing an action to recover a broker's commission, upon sustaining a demurrer to the complaint. Affirmed.

*S. S. Langland*, for appellants.

*G. Ward Kemp*, for respondent.

RUDKIN, C. J.—This is an appeal from a judgment of dismissal after sustaining a demurrer to the complaint.

Section 1 of the Act of March 8, 1905, Laws of 1905, p. 110 (Rem. & Bal. Code, § 5289), provides that,

"In the following cases, specified in this section, any agreement, contract and promise shall be void, unless such agreement, contract or promise or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: . . . (5) An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission;"

and the sufficiency of the following note or memorandum

[1]Reported in 106 Pac. 770.

under the foregoing section is the only question presented by the appeal:

"Naslin, J. O. All fractional Sec. 18, T. 24-21 all in Douglas County. Price, $20,000.00; ½ cash; 700 spitz; 600 W. Sap; 250 styman; 200 Y. N.; 400 B. Davis; 500 13 Twig; 100 mixed; 100 peach; 9 cherry; Berries, etc., Water for 40 acres; good house, barn and out buildings. Commission, 5 per cent."

This memorandum is defective in so many particulars that no argument can be made in its support. It has neither form nor substance. It is lacking in both parties and subject-matter. It authorizes or employs no broker or agent. It describes no real estate. It contains no agreement for the payment of compensation or a commission. Such a note or memorandum fulfills neither the letter nor the spirit of the statute.

As said by the court in *Grafton v. Cummings*, 99 U. S. 100:

"The statute not only requires that the agreement on which the action is brought, or some memorandum thereof, shall be signed by the party to be charged, but that the agreement or memorandum shall be in writing. In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. There is a defect in this memorandum in giving no indication of the party who sells. If Grafton was bound to purchase, it was because somebody was bound to sell. If he was bound to pay, somebody was bound to receive the money and deliver the consideration for the price so paid.

"There can be no bargain without two parties. There can be no valid agreement in writing without these parties are named in such manner that some one whom he can reach is known to the other to be bound also. No one is bound in

this paper to sell the Glen House, or to convey it. No one is mentioned as the owner, or the other party to this contract. Let it be understood that we are not discussing the question of mutuality in the obligation, for it may be true that if a vendor was named in this paper, the offer to perform on his part would bind the party who did sign. But Grafton did not agree to buy this property of anybody who might be found able and willing to furnish him a title. He was making a contract which required a vendor and a vendee at the time it was made, and he is liable only to that vendor. The name of that vendor, or some designation of him which could be recognized without parol proof extraneous to the instrument, was an essential part of that instrument to its validity."

The requirements of this statute have been considered by this court repeatedly, and the conclusions reached are fatal to the appellant's claim. *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473; *Foote v. Robbins*, 50 Wash. 277, 97 Pac. 103; *Forland v. Boyum*, 53 Wash. 421, 102 Pac. 34; *McCrea v. Ogden*, 54 Wash. 521, 103 Pac. 788; *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153.

The judgment of the court below is therefore affirmed.

MORRIS, CHADWICK, FULLERTON, and GOSE, JJ., concur.

[No. 8318. Department One. February 5, 1910.]

## *In re* WESTERN AVENUE.

## STANDARD FURNITURE COMPANY, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

TRIAL—NOTICE OF TRIAL—WAIVER OF OBJECTION—EMINENT DOMAIN. The notice of trial required by Rem. & Bal. Code, § 319, is not jurisdictional, and is waived, on the preliminary hearing in a condemnation suit, where the party made no motion to set aside the adjudication of public use, and subsequently went to trial on the question of damages, after ample time to prepare for the same.

EMINENT DOMAIN—DAMAGES—TRIAL—CONSOLIDATION OF CASES—DISCRETION. In eminent domain proceedings by a city, it is discretionary, under Rem. & Bal. Code, § 7768 *et seq.*, to consolidate actions against the owner and the lessee, and the ruling will not be reviewed unless prejudice is clearly shown.

SAME—DECREE—DIVISION OF DAMAGES. In eminent domain proceedings by a city, Rem. & Bal. Code, § 7778, authorizes the assessment of one recovery of damages against the landlord and tenant, leaving it for division between the parties entitled thereto.

TRIAL—MISCONDUCT OF JUDGE—COMMENT ON CREDIBILITY OF WITNESS. Upon the examination of a witness as an expert upon land values, it is error for the court to remark in the presence of the jury that the witness had qualified as an expert in other hearings and was competent to give an opinion as shown thereby and by reason of his connection with a well-known real estate office for three and one-half years.

WITNESSES—EXPERTS—QUALIFICATION — EVIDENCE — OPINIONS. A witness is not qualified to give an opinion as to the value of real estate along a certain street from the fact that he had lived in the city eight years and had been in the real estate business, where it was not shown that he had bought or sold property along the street or was otherwise familiar with values there or elsewhere in the city.

Appeal from a judgment of the superior court for King county, Gay, J., entered June 25, 1909, upon the verdict of a jury of no damages in a regrade condemnation, after a trial on the merits. Reversed.

[1]Reported in 106 Pac. 901.

*Richard Saxe Jones*, for appellant.

*Scott Calhoun* and *Stephen V. Carey*, for respondent.

CHADWICK, J.—This is an appeal from a judgment of no damages to appellant, in the Western Avenue (Seattle) regrade case. The case was originally tried in May, 1909, and a new trial was granted. The case again came on for trial in June, 1909. Many irregularities in procedure were charged in the first trial and the proceedings leading up to it, all of which, in our opinion, have become unimportant and will not be now considered. However, it may be material in our discussion of the questions which we do find in the record to say that it appeared on the first trial that the Washington Mattress Company, a corporation, occupied the property involved in this case as a lessee; that the mattress company had not been made a party to the proceedings, and to cure the possible error as well as other irregularities, the trial judge granted a new trial. It was thereupon agreed that counsel would enter an appearance for the appellant as well as the mattress company. After a motion for separate trials had been overruled, the case proceeded to trial, resulting in a verdict of no damage to appellant, and a verdict in the sum of $2,500 in favor of the mattress company. From this verdict, the Standard Furniture Company, the owner of the fee, has appealed.

We have read the long record, and considering the legal points involved without reference to the feeling which seems to have crept into the case, or the rhetoric with which personal opinions have been expressed, we find but little to engage our serious attention.

The first question arising is, whether a reversal should follow because this appellant had no notice of the time the case would be called for preliminary hearing and was not present when the court found that the property involved was to be taken or damaged for a public use. Rem. & Bal. Code, § 319, provides for notice of the trial, and the manner of its

service. This was disregarded, in so far as this appellant is concerned, by the city attorney, but we do not understand this notice to be jurisdictional. Appellant had ample time to prepare for the trial after the new trial had been granted. It made no motion to vacate or set aside the preliminary order of public use, but went to trial upon the question of damages. We think the objection that the hearing on the question of public use was had without the presence of appellant, comes too late upon a motion for a new trial or upon appeal.

The next objection which we deem it necessary to notice is that appellant was penalized by being forced to trial with the Washington Mattress Company, its lessee. The consolidation of this class of cases for trial is within the discretion of the court (Rem. & Bal. Code, § 7768 *et seq.*), and will not be reviewed unless prejudice is clearly shown.

It is also contended that the court erred in directing one recovery, leaving it for division between the parties found to be entitled thereto. The statute directs that this shall be done, and it was not error. Rem. & Bal. Code, § 7778.

One Pardee was put upon the stand by the petitioner, when the following colloquy between the court and counsel took place:

"Mr. Carey: Now, if that objection goes to the fact that I did not qualify him, why, of course, I will qualify him now. Mr. Jones: I do not care to take up the time for my—The Court: This witness not qualified? Mr. Jones: The court held he was qualified. I don't see—The Court: This witness has been testifying in this court on this regrade case and other matters for such a period of time in this very regrade, on the other branch of the trial, for ten days, and the court takes less time to qualify the witness like that than a new one, and besides that, the court holds that a man that has been actively engaged in the real estate business, in this city for the last three and a half years, and maintained his own office, and has been connected with so well established an office as George Dilling, prior to that time, is qualified to give opinion evidence, so you will proceed with the examination.

Mr. Jones: We would like our objection entered to the statement of the court, as being testimony from the court as to the credibility of the witness, and as to his qualifications, and a comment upon the testimony. The Court: I will say he is qualified to give an opinion. I am ruling on his qualifications to give an opinion. And it will be for the jury to— Mr. Jones: We are simply making our objection. The Court: It will be for the jury to pass upon the weight of his testimony, and to give it such credit as they think it is entitled to. Mr. Jones: We would like an opportunity— The Court: I heard your opinion. You made it. Mr. Jones: We object to the statement of the court, as constituting testimony in the case, as establishing the credibility of the witness, and commenting upon the testimony. The Court: The court, gentlemen of the jury, makes no comment on the testimony of the witness, nor attempts to give any credit to you whatsoever, and you will disregard the court's statement to counsel for the reason—and it is because you are the sole arbiters and the credibility of the witness is for the jury. Proceed with the examination."

The witness then testified that the property of this appellant was benefited to the amount of $6,000 to $6,500 over any damages sustained. The amount of testimony to be taken upon the qualification of a witness is for the court and will not ordinarily be reviewed. The weight and credit to be given to this opinion is for the jury. The remark of the court to which exceptions were taken was clearly error, and it must have so occurred to the trial judge, for he attempted to cure it by his subsequent remarks. If the witness had qualified himself in any degree, the effort of the court to cure the error would have been availing; but the record shows that he had not done so, and did not do so. There is nothing in the record except the opinion of the court tending to show his qualifications. Where, from the very nature of things, the verdict must be based, to a large extent if not entirely, upon the opinions of those familiar with property values, it is important that the jury should determine the credibility of a witness from the testimony and not,

unless by agreement of counsel, from any assurance on the part of the court. It is true that the witness testified that he had lived in Seattle eight years, had been in the employ of a real estate agent for three and one-half years, and since the previous November had been in business on his own account; but it was not shown that he had ever bought or sold any property along Western avenue, or was otherwise familiar with values there or elsewhere about the city. *Lines v. Alaska Commercial Co.*, 29 Wash. 133, 69 Pac. 642; *Glass v. Buttner*, 39 Wash. 296, 81 Pac. 699. A man may be following a business, trade, or profession, but it does not follow that he is doing business, or has had enough experience or opportunity for observation to qualify him to express an opinion upon a given subject.

For the reason just assigned, the judgment of the trial court will be reversed and a new trial ordered, with directions to submit the question of damages to the fee of the property, if any, to the jury, the damage to the leasehold being determined by the verdict in favor of the mattress company.

RUDKIN, C. J., FULLERTON, and GOSE, JJ., concur.

[No. 8482. Department One. February 7, 1910.]

# THE CITY OF TACOMA, *Respondent*, v. JAMES L. WETHERBY *et al.*, *Appellants*.[1]

EMINENT DOMAIN—FOR STREETS—PETITION—DESCRIPTION OF PROPERTY. In proceedings by a city to condemn land for a street, under Rem. & Bal. Code, § 7771, the petition need not describe land damaged or the whole tract out of which the land is taken, but only the land taken.

SAME—NECESSITY OF ANSWER. In condemnation proceedings by a city under Rem. & Bal. Code, § 7771, etc., no answer offering an issue is necessary.

SAME—DAMAGES—EVIDENCE—CONSEQUENTIAL INJURY. In eminent domain proceedings by a city, the landowner may give evidence of consequential damages, although only the part of the land to be taken is described.

SAME—EVIDENCE—VALUES—PRICES PAID—HARMLESS ERROR. It is not so prejudicial as to require a reversal that, upon an issue as to the value of land condemned, the owner was asked on cross-examination what he paid for it, where defendant had asked a witness what had been paid for similar land, and there was other evidence as to the value, supplemented by a view by the jury.

SAME—COMPARISON OF VALUES. Upon an issue as to the value of land condemned, it is not error to refuse to allow witnesses to approximate the value by reference to platted property, where the property was not platted, and the owner had shown it to be especially valuable for factory purposes and special uses.

EMINENT DOMAIN—APPEAL—RECORD—REVIEW. The refusal, in eminent domain proceedings, to allow evidence that the land had been leased, will be presumed correct when a copy of the lease offered in evidence is not in the record.

TRIAL—INSTRUCTIONS—REQUESTS. Objection that an instruction failed to name the date for fixing the market value of land, cannot be made in the absence of any request therefor.

TRIAL—INSTRUCTIONS—ARGUMENT OF COUNSEL. An instruction that the jury are to "disregard the statements of the attorneys as to the value of the lands," while not commendable is not prejudicial, where it goes no further than to suggest that the statements are not to be regarded as evidence.

[1]Reported in 106 Pac. 903.

EMINENT DOMAIN—FOR STREETS—DAMAGES—OFFSET OF BENEFITS. In eminent domain proceedings by a city, it is proper to instruct that benefits to adjacent property are to be deducted from the damages to such property, if the damage is in excess of the benefits, but if the benefits are equal, the jury must find the lands not damaged; regardless of questions that may arise on the assessment of benefits.

EMINENT DOMAIN—TRIAL—SEPARATE TRIALS—DISCRETION. In eminent domain proceedings by a city, it is discretionary, under Rem. & Bal. Code, § 7774, to refuse separate trials to owners of the property, to be reviewed only for abuse of discretion.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered July 1, 1909, upon the verdict of a jury rendered in favor of the plaintiff. Affirmed.

*H. W. Lueders*, for appellants Wetherby *et al.*

*Frederick H. Murray* and *Thos. Carroll*, for appellants Murray *et al.*

*T. L. Stiles*, *F. R. Baker*, and *F. A. Latcham*, for respondent.

CHADWICK, J.—This action was brought by the city of Tacoma to condemn certain property for the purpose of extending Center street in said city. Appellants Murray, Wallace, and Carroll are the owners of a tract of land, one hundred and fifty feet in width, and approximately six hundred and twenty-three feet long, lying parallel with, and adjacent to, the right of way of the Northern Pacific Railway Company. Appellants Wetherby own a like tract, approximately one hundred feet long. This adjoins the first described tract on the east. The case was tried as one case, but separate appeals are prosecuted by the claimants of the respective tracts. We will first consider the grounds urged by appellants Murray and their co-owners.

The point is made that the petition was insufficient to warrant the introduction of evidence, for the reason that it did not describe the whole tract out of which the land is sought to be taken. In this class of cases the statute is the only guide. Reference to Laws of 1907, §§ 4 to 8, pp. 318,

319 (Rem. & Bal. Code, §§ 7771 to 7775), makes it apparent that the description is sufficient. The law does not require the petitioner to set out the description of any land that may be consequentially damaged, but only such as is to be put to the public use. Nor is any answer offering or defining an issue thereon necessary. *State ex rel. Ami Co. v. Superior Court*, 42 Wash. 675, 85 Pac. 669; *Seattle & Montana R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720. Under almost all authority, the landowner may give evidence as to consequential damages, although only the part of the land to be taken is described in the record. This rule was adopted by this court in *Sultan Water & Power Co. v. Weyerhauser Timber Co.*, 31 Wash. 558, 72 Pac. 114. The cases are collected in Lewis on Eminent Domain (3d ed.), 698, and 5 Ency. Evidence, p. 241. Evidence of such damages was taken in this case, so that, irrespective of any question of practice, appellants have not been prejudiced.

It is also urged that the court erred in allowing evidence upon the question of benefits that would accrue to appellants' remaining property. This assignment will be discussed when considering an instruction covering the same subject.

To fix the value of the Wetherby tract, his counsel had asked a witness some questions as to the price paid for similar property theretofore purchased by the Union Pacific Railway Company. On cross-examination the city attorney asked the witness how much Mr. Wetherby paid for his land. Appellants' objections seem to be based on the theory that this testimony stands alone. If this were so, it might be regarded as error. *Port Townsend Southern R. Co. v. Barbare*, 46 Wash. 275, 89 Pac. 710. But there was other testimony going to the value of the property, and this being supplemented by a view of the premises by the jury, we do not consider it so prejudicial as to warrant a reversal.

The trial court refused to allow appellants' witnesses to approximate the value of the land taken by reference to platted property. That was not error. The property had

not been platted. Appellants had shown it to be especially valuable for factory purposes and special uses, and to make comparison by reference to town lots without allowance for streets, avenues, or alleys, and other considerations which distinguish acreage from platted ground, would tend to conjecture and speculation on the part of the witness, rather than to the ascertainment of the true value as it was at the time of the trial.

The trial court refused to hear testimony tending to show that the land had been leased to the Union Pacific Railway Company. It is questionable whether this testimony could have been received on any theory. But as a copy of the lease offered by counsel is not before us, we must presume that the ruling of the court was proper.

It is urged that the court erred in instructing the jury that they should fix the actual cash market value of the land proposed to be taken. This objection is urged on the theory that, under the act of 1907, a long time must necessarily intervene between the date of appropriation and date of payment, and that the court should have so instructed the jury. Regardless of any merit this contention might have otherwise had, no request for an instruction upon this point was made by appellants. The instruction given by the court is the one usually given in such cases, and appellants are in no position to complain of it.

The jury were told that, in estimating the value of the lands taken, they should disregard the statements of the attorneys as to the value of the lands. It would be better, if the court assumes to instruct the jury upon the weight to be given to the arguments of counsel, to do so fully. It is the privilege of every litigant to be represented by counsel who has the right to advocate the cause of his client and to combat that of his adversary. He may discuss the facts of the case, the manner and demeanor of the witnesses, and all things presented by, or growing out of, the record. To these arguments the jury should give the most careful considera-

tion, for the office of the attorney is to assist them in arriving at a true verdict. But it does not follow that the court may not warn the jury that the ultimate fact must be found from the testimony of the witnesses, and that in case of doubt their recollection of the evidence must prevail over the statements of counsel. While we do not commend the instruction given by the court as a model for future use, we think it went no further than to suggest that the statements of counsel were not to be regarded as evidence. We will not presume that the jury were misled thereby.

The following instruction is complained of:

"In determining whether any such adjacent property is damaged, you will determine whether or not the remaining property is benefited, and if the damage is in excess of the benefits arising from the opening of the proposed street, then you will assess the damages to the amount of such excess; but if you find the benefit to the adjacent property is equal to the damage the adjacent property will sustain by reason of the opening of the street, then you will find the property is not damaged."

The question of comparative damages, as applied to condemnations for municipal purposes, has been settled in this state both by statute and by judicial opinion. The instruction given seems to have been drawn under the statute, and it is in accord with the decisions of this court as collected in *Kitsap County v. Melker*, 50 Wash. 29, 96 Pac. 695. The case was tried as a condemnation case, and we cannot now consider any questions that might arise under the assessment proceeding which is to follow:

The only question raised by appellants Wetherby not covered by the foregoing is that the court erred in refusing these appellants a separate trial under the condemnation act. Laws 1907, p. 318, § 7 (Rem. & Bal. Code, § 7774). By the terms of the statute, this was a matter resting within the discretion of the trial court, and cannot be considered by us in the absence of some showing that the court has abused its discretion. *In re Western Avenue*,

*ante* p. 290, 106 Pac. 901. Certain other assignments of error are made based upon the refusal to receive or to strike out evidence and upon instructions given and refused. But the legal questions arising therefrom are disposed of in the discussion of the case made by appellants Murray and their co-owners.

The judgment of the lower court is affirmed.

RUDKIN, C. J., GOSE, MORRIS, and FULLERTON, JJ., concur.

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[No. 8393. Department One. February 9, 1910.]

## CHARLES J. ALKIRE, *Respondent*, v. MYERS LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—DEFECTIVE APPLIANCE—PROMISE TO REPAIR—PLEADING AND PROOF—VARIANCE. It is not a failure of proof to allege the promise of the master to furnish a new snap line on a donkey engine and that the line complained of broke and injured the plaintiff, and to prove that the line which broke was not in use at the time of the promise, but was a defective line substituted by the master.

TRIAL—WAIVER OF NONSUIT—AMENDMENT TO CONFORM TO PROOF. Where a motion for nonsuit was waived by the defendant by putting in its evidence, the case will be considered on all the evidence, received without objection, and the pleadings will be deemed amended to conform to the issue presented in its entirety.

MASTER AND SERVANT—DEFECTIVE APPLIANCE—PROMISE TO REPAIR—PERFORMANCE OF PROMISE—EVIDENCE—SUFFICIENCY. As a promise to repair need not be in express words, the evidence is sufficient to show a promise to repair a defective snap line, where it appears that complaint was made of the "rigging," which included the snap line, and the employer's manager replied that he had ordered or would order a "new line," and undertook to replace not only "the line" but the snap line also.

SAME—PROMISE TO REPAIR—REASON FOR COMPLAINT. A complaint made by the engineer of a donkey engine as to a defective rigging, and that it was breaking every day and that some one would be killed by it, sufficiently shows that self-protection was the motive, as his position was in the zone of danger.

[1]Reported in 106 Pac. 915.

SAME—ASSUMPTION OF RISKS—PROMISE—IMMINENT DANGERS. An engineer of a donkey engine who complained of a defective cable, and was promised a new one, does not assume the risks on continuing the work, on the theory that the danger is imminent, apparent, and pending; since the promise is an agreement that the master should temporarily assume the risk.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict of $9,000 for personal injuries is not excessive, where it appears that the plaintiff, a blacksmith and engineer, 32 years of age, in good health and earning three dollars per day, was injured by the breaking of a cable, was in a hospital eight weeks, one kidney was removed, suffered greatly, and was put to an expense of $700 to $1,000 for treatment.

TRIAL—IMPROPER QUESTIONS—PREJUDICE. No prejudice results from an improper question as to an inquiry made as to whether a man would be accepted for insurance after the removal of one kidney, which was objected to as hearsay, the objection sustained, and the question withdrawn without having been answered.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 14, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by an engineer of a logging engine. Affirmed.

*Hudson & Holt* (*Chas. Bedford*, of counsel), for appellant.

*L. C. Stevenson* and *Roy E. Bigham* (*J. A. Sorley*, of counsel), for respondent.

GOSE, J.—This is an action for the recovery of damages for personal injuries. There was a verdict and judgment for the plaintiff, from which the defendant has appealed.

The negligence charged in the complaint is, that the respondent was in the employ of the appellant as a donkey engineer; that the engine was used for the purpose of drawing logs from the woods by means of a cable and snap line, which worked over a drum attached to the engine; that a few days preceding the injury, the respondent notified the appellant that the cable and snap line were worn out and defective, and objected to using them; that the appellant then promised

the respondent that he would replace them with new ones which would be sufficient to perform the work; that the respondent, relying upon the promise, and at the appellant's request, continued as engineer and was in the discharge of his duties when he received the injury; that the appellant furnished a new main cable, but failed to furnish a new snap line, and that the snap line broke, the recoil striking the respondent and causing the injury complained of. The answer joined issue on the charge of neligence and promise to repair, and pleaded affirmatively that the respondent assumed the hazard of the employment, and that his negligence caused the injury. At the close of the respondent's testimony the appellant moved for a nonsuit, and at the conclusion of all the testimony moved for a directed verdict.

The appellant thus states the principal question in the case:

"The primary question in this case is this: Was there such a failure of proof as entitled the defendant to a judgment on its motions or requests for a peremptory instruction or to a new trial after the verdict of the jury had established the fact that the *snap line* which broke and struck respondent was not the snap line to which the alleged promise related, and was not the snap line in use at the time this alleged promise was made."

The determination of this question necessitates a brief consideration of the evidence, and the applicable principles of law. The evidence shows that the snap line which broke and struck the respondent was a short line attached to the main cable by means of a hook and eye, and that it was used for making short hauls of the logs. At the close of the respondent's testimony it had not been shown that any change had been made in the snap line at the time of the accident. The appellant's evidence, however, disclosed that, a short time before the accident, the appellant took a piece of cable theretofore used at its mill and substituted it for the snap line which it had been using, and that this was the line in use and which broke and injured the respondent. After this tes-

timony had been introduced, the respondent offered evidence which tended to show that the substituted snap line was installed without his knowledge, and that it was defective and practically worn out when installed. There was a sharp conflict in the evidence as to the condition of this line, the appellant's witnesses testifying that it was practically new and adequate for the work. The precise point made is that the complaint charges the promise of the master to furnish a new snap line, the failure to do so, and that the line complained of broke and caused the injury; whilst the jury upon all the evidence, in answer to a special interrogatory, found that the line which broke was not the line which was in use at the time of the alleged promise.

It is earnestly contended that this was not a variance, but an entire failure of proof. We cannot agree with this contention. The gravamen of the charge is that the master agreed to furnish a new cable and snap line, and that it did furnish a new cable but failed to furnish a new snap line. It would be highly technical, therefore, to hold that there was a failure of proof. Whether the appellant continued to use the same defective snap line, or replaced it with another defective one, would not affect the right of recovery or amount to a failure of proof. The promise, if made, could only be performed by furnishing another line apparently adequate for the use. Moreover, at the close of respondent's evidence, the appellant had the option to stand on its motion for a nonsuit or to submit its evidence. It chose the latter course, and the case now stands, not upon the pleadings and the respondent's evidence alone, but upon the case as made upon all the evidence. If the case made by the appellant, or by it and the respondent in his rebuttal, is not in harmony with the pleadings, no objections having been interposed to the evidence, the pleadings will be treated as amended so as to conform to the issue actually presented by the evidence as an entirety. *Kluska v. Yeomans*, 54 Wash. 465, 103 Pac. 819.

The next contention is that there was neither a promise to

furnish a new snap line, nor a reliance upon the promise if any was made. The testimony of the respondent in this behalf tends to show that he said to the appellant's manager, about ten days before the accident, that the rigging was defective, that it was breaking every day, and that some one would be killed by it; and that the latter replied either that he had ordered, or would order, a new line; that he relied upon the promise and continued at his work; that a few days later a new cable was furnished, and that a few days before the accident a defective snap line was substituted for the one complained of. It is true that the respondent made no definite objection to the snap line, but it was a part of the rigging. However, the manager to whom the complaint was made seems to have understood that it went to the efficiency of both lines; for, as we have seen, he sought to remedy the defect. The master's promise to repair need not be in express words; it may be implied from the words spoken or from the subsequent conduct of the master.

"Any acts or expressions by which the servant gives the proper agent of the employer to understand that he is unwilling to continue in the employment, unless the cause of danger is removed, constitute a sufficient complaint; and any acts or expressions by which such agent gives the servant to understand that the cause of the danger will be removed, constitute a sufficient promise." 1 Labatt, Master & Servant, § 419.

It is also urged that the servant will be held to have assumed the risk unless his complaint was made in reference to his personal safety, and that the record does not show that it was made upon this ground. *Primley v. Elbe Lumber & Shingle Co.*, 53 Wash. 687, 102 Pac. 768, is cited as supporting this contention. We think the evidence does show that self-protection was the motive which prompted the complaint. The complaint, as we have stated, was that some one would be killed if a better cable was not furnished. The statement necessarily applied to the respondent as his position at the engine placed him in the danger zone. This fact was known to the master. In the *Primley* case the objection

was that the retention of a certain employee would cause a loss of time, labor, and material. The question of personal safety was not suggested to the master.

"When complaining of defective instrumentalities or machinery it is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defect be removed or remedied. It is sufficient if, from the circumstances of the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise. It is ordinarily for the jury to say whether the servant's reliance on the promise by the master induced him to continue work." 1 Labatt, Master & Servant, § 421.

The point is made that, when the danger is imminent, apparent, and impending, the servant assumes the risk if he continues to work. The promise is in effect an agreement by the master to assume temporarily the responsibility for any accident that may occur. 1 Labatt, Master & Servant, § 431. After the promise has been made, the servant does not assume the risk of an injury until such time has elapsed as to preclude all reasonable expectation that the promise will be kept. *Shea v. Seattle Lumber Co.*, 47 Wash. 70, 91 Pac. 623; Shearman & Redfield, Negligence, § 215. We think there was sufficient evidence to carry the case to the jury tending to show that a complaint was made to the master, that it promised to remedy the defect, and failed to do so; that the respondent relied upon the promise; that the complaint was made because the respondent was apprehensive of his personal safety; that the master so understood it, and that the injury resulted from the failure of the master to keep its promise. The respondent was entitled to have the jury advised as to the principles of law applicable to these facts, and the motions were properly denied.

The next point urged is that the appellant should have been granted a new trial on account of erroneous instructions.

It is urged that the court did not correctly state the law as to the risk which the servant assumes. The instructions, as an entirety, were more favorable to the appellant than the issue warranted. The respondent's case as to a promise and a failure to repair was not submitted to the jury under proper instructions, and he and not the appellant was prejudiced thereby.

The appellant's requested instructions were but a restatement of the contention made in the motion for a directed verdict, and were properly refused.

The jury returned a verdict for $9,000, and a judgment was entered for this amount. It is contended that the verdict was excessive. The respondent at the time of the injury was thirty-two years of age, in good health, a blacksmith and engineer by trade, and was earning three dollars per day. After receiving the injury he was in the hospital for several days. About a month later he was again taken to the hospital in a serious condition, and one kidney was removed. He remained in the hospital for about eight weeks after the operation. The testimony shows that the pain and suffering were great; that the expenses for a nurse and surgeon were between $700 and $1,000; and that it is probable that he will never be able to resume his former work. While the damages awarded were liberal, we cannot say that they were excessive.

A physician, testifying as to the effect the removal of the kidney will have on the respondent's life, said: "I inquired of my superior officials or officers of the life insurance company for which I do the examining to find out whether they would accept this man for insurance." The appellant's counsel interposed an objection to the evidence on the ground that it was hearsay. The court, on ruling upon the objections, said: "That is not proper. It is simply repeating hearsay." Whereupon the respondent's counsel stated that he would withdraw the question which brought forth the answer. The inquiry was improper, but is not of sufficient gravity to

warrant a reversal. The witness merely stated that he had inquired, but the record does not disclose that the inquiry was answered. The ruling of the court made it plain to the jury that the evidence was not to be considered.

The views we have expressed require an affirmance of the judgment, and it is so ordered.

RUDKIN, C. J., CHADWICK, and FULLERTON, JJ., concur.

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[No. 8457. Department Two. February 9, 1910.]

## JOHN A. FALLDIN *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS — SIDEWALKS — CONSTRUCTIVE NOTICE — EVIDENCE — ADMISSIBILITY. In an action for injuries sustained in a fall upon a defective sidewalk, evidence of the condition of the walk and of other accidents but a few days, or at most weeks, prior to the accident in the same locality, is admissible to show constructive notice of the defect.

APPEAL — REVIEW — EVIDENCE — WAIVER OF OBJECTION. Error cannot be predicated upon the refusal to strike out evidence outside the issues, when it was admitted without objection.

MUNICIPAL CORPORATIONS — CLAIMS FOR INJURIES — VARIANCE — ULTIMATE EFFECTS. A claim against a city for personal injuries to plaintiff's "limbs, side, back, and neck," admits of evidence of a goiter that developed subsequently and by reason of the accident, where the ultimate result could not be known at the time of the accident, and the defendant had ample opportunity to investigate and claimed no surprise.

DAMAGES — PERSONAL INJURIES — EXCESSIVE VERDICT. A verdict for $8,500 for injuries sustained in a fall upon a defective sidewalk, reduced by the trial judge to $5,000, will not be set aside as excessive, where the plaintiff was severely injured in her back, side, and neck, is suffering from traumatic lumbago and violent headaches, and there was evidence that she was permanently afflicted with severe nervous prostration from shock.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 1, 1909, upon the verdict

[1]Reported in 106 Pac. 914.

of a jury rendered in favor of the plaintiffs, for personal injuries. Affirmed.

*Scott Calhoun* and *James E. Bradford*, for appellant.
*Douglas, Lane & Douglas*, for respondents.

Crow, J.—This action was commenced by John A. Falldin and Alma C. Falldin, his wife, against the city of Seattle, to recover damages for personal injuries sustained by Alma C. Falldin in falling through a defective sidewalk. From a judgment in favor of the plaintiffs, the city has appealed.

Appellant first contends that the trial court erred in so ruling upon evidence as to permit witnesses for the respondents to state the condition of the walk prior to the accident, without any limit as to time or locality, and to testify to other accidents without showing that they occurred in the same place or about the same time, or that they were caused by the same defect. The record does not sustain appellant's suggestion that no limitation of time or place was imposed upon the witnesses in giving their evidence, or that any such limitation was necessary. Their evidence tending to show the defective condition of the walk was confined to a period of but a few days or, at most, weeks, prior to the accident, and also to the locality where the respondent was injured. It was clearly competent for the purpose of showing constructive notice to appellant. The other accidents mentioned by the witnesses happened in the same locality, on the same walk, and about the same time. That such evidence was competent is shown by the following cases cited by appellant: *Franklin v. Engel*, 34 Wash. 480, 76 Pac. 84; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Smith v. Seattle*, 38 Wash. 481, 74 Pac. 674.

In *Shearer v. Buckley*, this court said:

"The court announced that evidence would be heard as to the condition of the street for a time prior to the accident, confined to within a block of the point where the accident occurred, and at the same time stated that such evidence was

admitted as bearing only upon the question of constructive notice to appellant, and for the purpose of showing whether the condition in the immediate vicinity was such that appellant ought to have known of the particular defect. The evidence was admitted in accord with the rule followed in *Laurie v. Ballard, supra* [25 Wash. 127, 64 Pac. 906], and the court did not err."

Alma C. Falldin fell through a defective sidewalk for a distance of about eight feet, into a gully below, and was injured in her back, side and neck. The verified claim for damages which she filed with the city so stated. Her physician, when asked on direct examination as to the condition of her neck, testified that she had a goiter which might have resulted from her fall. This evidence was at the time admitted without objection. Appellant's counsel on cross-examination went further into the question of the existence and cause of the goiter, but later asked that all evidence relative thereto be stricken, for the reason that the goiter was not specified or included within the terms of respondents' notice and claim served upon the city. Appellant now insists that the court erred in denying its motion to strike. It is in no position to predicate error on evidence which it permitted to be admitted without objection. In any event, respondents' verified claim stated that Alma C. Falldin had sustained "severe and painful injuries to her limbs, side, back and neck." The accident occurred on September 21, 1907, the claim was filed on October 18, 1907, and the trial occurred in March, 1909, almost eighteen months later. If, in the meantime, the goiter had developed, and if, as her physician testified, it resulted from her fall, the evidence was competent. Her claim for damages informed the city of her contention that she had received an injury to the neck. At that time it may have been impossible for her to more definitely state the ultimate effect or results of her injuries. The city was sufficiently advised to enable it to have her condition investigated prior to the trial. It did not claim surprise, nor did it ask a continuance. Other physicians testified, stating it as their

opinion that the true cause of goiter was obscure and unknown, but that it would not result from a fall such as respondent experienced. The weight and credibility of this conflicting evidence was for the jury. Upon the entire record we are unable to find that the trial judge erred in the admission or exclusion of evidence.

Error is predicated on instructions given and refused. We find no prejudicial error in this regard, nor do we deem it necessary to enter upon a specific discussion of the instructions of which complaint is made. We have carefully examined those given and conclude that they clearly, fully, and impartially state the law applicable to the issues and evidence.

The jury returned a verdict for $8,500. The trial judge denied appellant's motion for a new trial on condition that respondents consent to remit $3,500, which they did. Judgment was then entered for $5,000. Appellant contends that the damages are still so excessive as to require a new trial or a further reduction. After a careful consideration of all the evidence, we do not feel that we would be justified in ordering a further reduction. The issues involved were considered by the jury. The trial judge, who saw the respondent and other witnesses and heard them testify, made such a reduction as, in the exercise of his judgment and discretion, he concluded would be fair and just. The respondent was severely injured in her back, side, and neck. She is suffering from traumatic lumbago, and from severe pains in the neck causing violent headaches. She is also afflicted with traumatic neurasthenia, commonly known as severe nervous prostration, resulting from shock or injury. Some of the physicians who testified were of the opinion that her condition would be permanent; others thought she would recover. The evidence on this point was conflicting and was for the jury. Her attending physician testified that her condition was more serious at the time of the trial than it was shortly after the accident, and that she was constantly growing worse. If her condition as disclosed by the evidence is permanent, a fact

which the jury must have found, the damages finally awarded, while perhaps ample compensation, are not excessive. Under all the circumstances and facts shown, we conclude that we would not be justified in ordering a further reduction.

The judgment is affirmed.

RUDKIN, C. J., DUNBAR, PARKER, and MOUNT, JJ., concur.

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[No. 8517. Department Two. February 9, 1910.]

LITTLE BROTHERS MILL COMPANY, *Appellant*, v. W. E. BAKER *et al.*, *Respondents*.[1]

MECHANICS' LIENS—COMMINGLED MATERIALS — EVIDENCE — SUFFICIENCY. A materialman is not entitled to a lien upon a house for lumber furnished to a contractor who was also building another house, where the lumber for the two houses was so commingled by the materialman that it was impossible to determine what particular part went into the house upon which the lien was claimed, and he was unable to comply with a demand for a segregated bill therefor.

Appeal from a judgment of the superior court for King county, Main, J., entered June 17, 1909, upon findings in favor of the defendants, dismissing an action to foreclose a materialman's lien, upon the close of plaintiff's evidence. Affirmed.

*F. E. Knowles*, for appellant.

*Aust & Terhune*, for respondents.

DUNBAR, J.—This is an action to foreclose a materialman's lien on account of lumber and material furnished in the construction of a house on lots 35, 36, and 37, in block 1 of Dawson's addition to the city of Seattle, King county, Washington, which we will for convenience hereafter denominate the Baker house. One D. H. Sykes, who was the contractor for the Bakers, was made a defendant in the action and de-

[1]Reported in 106 Pac. 910.

faulted, and judgment against him was entered for $265.67, interest and costs. Sykes, as contractor and agent for respondents, purchased of the appellant under the original contract, at an agreed price, lumber to the value of $290, and extra lumber was purchased during the construction of the building. It appears that, at the time Sykes was building the Baker house, he was also remodeling or building another house. A certain payment was made by Sykes, which was applied upon his own account and not upon the Baker account. The court, after the introduction of the evidence, determined that the same did not show nor identify the lumber sold by appellant for the construction of respondents' house, and at the end of appellant's testimony, upon motion of the respondents, the respondents W. E. Baker and Clara Baker were dismissed from the case, and the lien denied. From this judgment of dismissal, this appeal is taken.

The appellant relies largely upon the case of *Seattle Lumber Co. v. Sweeney*, 43 Wash. 1, 85 Pac. 677, which it claims is a case directly in point. In that case the liberal rule was adopted by this court, and we quoted extensively from *Rice & Floyd v. Hodge Bros.*, 26 Kan. 164, where, among other things, it was said:

"To require direct and positive testimony, that as to each specific article delivered, that it was in fact used in the buildings, would make the mechanics' lien law more a burden and a trap than a blessing and a help. When materials are contracted for use in a proposed building, when they are delivered in pursuance of such contract, and when the building is in fact completed, and there is no testimony tending to raise even a suspicion that the materials therefor were elsewhere obtained, or that those contracted for were not used therein, and especially when some of the materials are shown to have actually entered into its construction, it is fair to conclude and say that such materials did in fact go into the building, and that the seller has a mechanics' lien therefor."

But this state of facts is not shown by the testimony to exist in this case; for material was not delivered in pursuance of the contract, and there is not only testimony tending to

raise a suspicion that the materials were not all used in the building, but absolute unqualified testimony to that effect by the appellant itself. While, as the opinion quoted truthfully says, "to require direct and positive testimony under such circumstances would make the mechanics' lien law more of a burden and a trap than a blessing and a help," to go to the other extreme and allow a lien to be established where the testimony shows that the lumber furnished was not all used in the construction of the building upon which a lien is said to be established, but, on the contrary, was so mixed and commingled by the party furnishing the material that it was impossible to determine what particular part of the lumber went into the building or what part was used in some other building, would become equally a burden upon the owner of the building. The trouble in this case is that the appellant so intermingled the lumber that it is impossible to tell what lumber went into the Baker house and what went into the Sykes house. This appears from the testimony of G. A. Little, a member of the appellant company and one of the active managers, when he testified as follows:

"For this lumber that was shipped in there on Mr. Sykes' direction, after the wagon went over there, I could not say which identical part of the load went to one place or to the other. They were both designated to him and I heard the teamster say that some portions of some loads went to one place and some to the other."

So that it appears that the appellant itself—for it was its own teams that hauled this lumber, and the teamsters were, of course, the agents of the appellant—knew that only a part of this lumber was taken to the house of the Bakers. Again, in answer to a question by the court: "This lumber that was sent over there was so intermingled between the houses that you could not tell which was which?" the answer was: "Yes, sir; because part that ran out at the same time went to both houses. Two by four and shiplap all looks alike." It also appears without contradiction that, when appellant pre-

sented its bill to Mrs. Baker, she demanded a segregated bill showing what portion of the lumber went into her house and what portion into the Sykes house, and the appellant was confessedly unable to give her such a bill and so stated in its testimony. Under such circumstances, the appellant is attempting to establish a lien on the Baker house for materials which it is not only unable to show went into the Baker house, but a portion of which it conclusively appears was diverted through the agency of the appellant from the Baker house and actually went into the Sykes house. To permit a lien on the Baker house for this lumber would be manifestly unjust, and would be going beyond the contemplation of the lien law.

The judgment of the court is affirmed.

RUDKIN, C. J., PARKER, CROW, and MOUNT, JJ., concur.

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[No. 8153. Department One. February 11, 1910.]

## A. L. BROWN *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS — IMPROVEMENTS—PROCEEDINGS—ASSESSMENTS—EMINENT DOMAIN. Where it is necessary to exercise the power of eminent domain in order to make a municipal improvement, the entire proceedings need not be completed under the eminent domain act, Rem. & Bal. Code, § 7768, which was designed solely to ascertain and assess the compensation; and the city may order the work done and levy the assessment under its charter provisions and ordinances, and not in the condemnation proceedings.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. Error in excluding evidence is cured where it was subsequently admitted.

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—CONFIRMATION—FINDINGS—NECESSITY. The hearing in the superior court upon the confirmation of a city assessment roll for public improvements, is not the trial of an action at law in which findings of fact are required.

[1]Reported in 106 Pac. 1113.

SAME—REVIEW. The confirmation of a local municipal assessment will not be set aside upon appeal upon conflicting testimony evenly balanced, especially where there is nothing to indicate unfairness or partiality, and the city council spent much time in equalizing the assessments.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 22, 1909, confirming an assessment for street improvements, upon an appeal from confirmation by a city council. Affirmed.

*Chas. E. McAvoy* and *J. L. Corrigan*, for appellants.

*Scott Calhoun*, *H. D. Hughes*, *O. B. Thorgrimson*, and *Leander T. Turner*, for respondent.

FULLERTON, J.—This is an appeal from an order and judgment of the superior court of King county confirming an assessment roll. In May, 1906, certain persons owning more than one-half of the property abutting upon and lying adjacent to Third, Fourth, and Fifth Avenues, between the intersection of these streets with Pine street on the east and Cherry street on the west, in the city of Seattle, petitioned the city council of that city to widen and regrade these avenues, with their intersecting cross streets, in accordance with certain specifications which were set forth in the petition. The city council thereupon by ordinance adopted the specifications set out in the petition, and directed that proceedings be begun under the eminent domain statute to condemn the property the widening of the street and the change of grade would take and damage. Subsequently proceedings in condemnation were had, and the compensation required to be made to the holder of property taken and damaged was ascertained, and an assessment made to pay the same. Thereafter the city passed another ordinance directing the improvement to be made, under which a contract for the grading was let and an assessment made to pay the cost thereof.

In this assessment, two lots, the property of the appellant Brown, were assessed at $4,734.84 and $3,523.08, re-

spectively, and two certain other lots, the property of the appellant Anderson Investment Co., were assessed at the same figures. The owners conceived these assessments unjust and disproportionate to the rates like and similar property was assessed, and filed written objections with the city council setting out their objections to the roll. These objections were overruled by that body, whereupon they appealed to the superior court. There again the roll was confirmed, and from the order of confirmation they appeal to this court.

The appellants, by their counsel, first suggest a question of jurisdiction. It is argued that where it is necessary to exercise the power of eminent domain in order to make a public improvement, the entire improvement must be completed in the eminent domain proceedings; that the improvement is in one proceeding, and one part cannot be done in the eminent domain proceedings and another part in a proceeding before the city council. But we do not think this contention tenable. The provision of our state constitution forbidding the taking or damaging of private property for a public use until just compensation has been made to the owner or paid into court for him, necessitates ascertaining the compensation and levying and collecting an assessment to pay the cost of the property taken or damaged before any work at all on the actual improvement is performed. A very casual reading of the eminent domain statute (Rem. & Bal. Code, § 7768 *et seq.*) will show that it was designed solely to ascertain and assess this compensation. It does not provide for letting the contract for doing the actual work nor for levying an assessment on the property benefited to pay the cost of such work. The city is therefore free to order the work done under its charter provisions and ordinances passed pursuant thereto and levy an assessment to pay the cost thereof.

The second contention is that certain evidence offered on behalf of the appellants at the hearing in the superior court

was improperly excluded, but we do not find that the record sustains this contention; the evidence offered, it is true, was excluded when first presented, but the court subsequently permitted it to be introduced. If any error was committed in excluding it when first offered, the error was cured by its subsequent admission.

The court made no findings of fact or conclusions of law other than such as the judgment entry contains. This is assigned as error, but we think no such findings or conclusions were necessary. The hearing before the superior court is not the trial of an action at law in the sense defined in the code which makes such findings and conclusions necessary. The court but sits in review of the findings of the assessing board, and no findings or conclusions are required further than those necessary to make clear the judgment of the court.

The fourth and last contention questions the conclusions made by the court upon the evidence. Three witnesses, dealers in real estate, testified to the inequalities in the roll with special reference to the appellants' property, saying that it was assessed too high as compared with other properties in the assessment district. On the other hand, an equal number, equally qualified, testified to the correctness of the roll. It was shown, furthermore, that the city council itself acting as a body and through committees spent much time in preparing the roll, and in correcting inequalities in it on complaints that seemed to them just. The roll on its face contains nothing that indicates unfairness, partiality or inequality, and under these conditions we can do nothing more than approve it.

The judgment will stand affirmed.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8152. Department One. February 11, 1910.]

## J. A. JAMES *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.[1]

HUSBAND AND WIFE—ACTIONS—JUDGMENT—VALIDITY—WAIVER OF ERROR. Where a husband and wife, represented by counsel, are entitled to a judgment on a verdict relieving their property from a special assessment, but a different judgment is entered upon the stipulation of the husband alone, the same is not void, but merely erroneous, and the wife cannot complain where she did not move to correct it, or appeal therefrom.

ESTOPPEL—JUDGMENTS—ACCEPTING BENEFITS. Where parties accepted the benefits of an award of damages given by a judgment in condemnation, they are estopped to assert that the judgment was void because entered upon an unauthorized stipulation.

MUNICIPAL CORPORATIONS—AUTHORITY OF OFFICERS—JUDGMENT—VALIDITY. A judgment in condemnation proceedings by a city, upon the stipulation of city officers entitled to represent the city, is not void for want of authority of the officers to make the stipulation, where the court had jurisdiction of the subject-matter and the parties, and cannot be repudiated by the adverse party for the city.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 23, 1909, confirming an assessment for street improvements, upon an appeal from confirmation by a city council. Affirmed.

*Chas. E. McAvoy* and *J. L. Corrigan*, for appellants.

*Scott Calhoun*, *Howard D. Hughes*, *O. B. Thorgrimson*, and *Leander T. Turner*, for respondent.

FULLERTON, J.—This case was heard by the trial court with the case of *Brown v. Seattle*, *ante* p. 314, 106 Pac. 1113, and a reference to that case is made for a statement of the facts. The questions presented also with one exception, are the same as those presented in that case. We will therefore notice only the additional question.

In the condemnation proceedings brought by the city,

[1]Reported in 106 Pac. 1114.

the jury returned a verdict finding that the land taken belonging to the appellants was of the value of $1,000, and that the remainder of their property would be damaged by the contemplated improvement, over and above all benefits, in the sum of $1. Before the judgment was entered on the verdict, the appellant J. A. James and the respondent city entered into a stipulation by the terms of which the appellants agreed, in consideration of the city consenting to the entry of a judgment on the verdict, to pay any assessment that might thereafter be levied by the city to pay the costs of grading the streets in the improvement district, and thereupon a judgment was entered on the verdict in conformity with the stipulation.

It is the contention of the appellants that they are not bound by this provision of the judgment. The first reason assigned in the support of their claim is that the appellant Emerette James did not sign the stipulation, and it is not shown that her husband had authority to sign on her behalf. But the validity of the judgment does not depend upon this stipulation. This was but a part of the evidence on which the judgment was founded. She was a party to the action, was represented by counsel, and like any other litigant she must correct errors in judgments entered against her by moving in the court entering them, or by appeal direct to the reviewing tribunal. The judgment, however erroneous it may be, is not void, and parties cannot repudiate even erroneous judgments at their pleasure. Moreover, this appellant accepted the benefits of the judgment by accepting the awards made for her property. This alone estops her from claiming that the judgment is void.

The second reason is that the officers representing the city had no right to make such an agreement. But here, again, we repeat that the city was a party to the action and the judgment was entered therein with the consent of the persons who had the right to represent the city. The court had jurisdiction over the parties and the subject-matter. Its

judgment therefore is not void, but so far binding that the city itself cannot repudiate it; for a much stronger reason the appellants cannot repudiate it for the city.

It is not to be questioned that, under the rule of the cases of *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106, the appellants were entitled on the verdict of the jury to a judgment that would exonerate them from any further assessments on account of the contemplated improvement, and had they insisted upon it, possibly could have obtained such a judgment. But they chose to accept a judgment waiving that right. Having done so, they are now estopped from claiming it.

There was no error in the order appealed from, and it will stand affirmed.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

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[No. 8275. Department Two. February 11, 1910.]

JULIUS KOSCHNITZKY, *Appellant*, v. HAMMOND LUMBER COMPANY, *Respondent*.[1]

FRAUDS, STATUTE OF—ORAL LEASE—PART PERFORMANCE. An unacknowledged lease for a logging right of way, for a period of ten years, for a small annual rental, is taken out of the operation of the statute of frauds by part performance, where the lessee went into possession, built its road at a cost of $40,000, and complied with a contemporaneous agreement (which was the consideration for the lease) by clearing the land and a stream, and building fences and a bridge, involving the expenditure of a large amount of money, and increasing the rental value of the land.

APPEAL—REVIEW—RIGHT TO ALLEGE ERROR—CROSS-APPEAL—NECESSITY. In the absence of a cross-appeal, the respondent cannot complain of the action of the lower court in denying its prayer for specific performance, and thereby obtain, on the adverse party's appeal, a more favorable judgment than it obtained below.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered June 7, 1909, upon findings in

[1] Reported in 106 Pac. 900.

favor of the defendant, in an action to recover real property and quiet title, after a trial on the merits. Affirmed.

*B. L. Hubbell*, for appellant.

*Coovert & Stapleton*, for respondent.

DUNBAR, J.—This action is brought by appellant to recover from respondent possession of a strip of land in use as a private logging road, and to quiet appellant's title thereto. Respondent alleged a contract for a ten-years' lease, and asked specific performance of said contract. The judgment of the trial court was that the respondent do not have specific performance of the alleged contract, that neither party recover costs, and that the action of the plaintiff be dismissed. From the part of the judgment denying costs and dismissing his action, plaintiff appeals.

The record shows that the appellant is the owner in fee simple of the premises described in the complaint, and on March 3, 1906, entered into a written agreement with J. T. and R. J. Moylan, copartners doing business as Moylan Brothers, for the lease of a strip of land across the appellant's premises for a logging road. This lease was reduced to writing, signed, and recorded, but was not acknowledged. Contemporaneously with this lease and on the same day, another and additional agreement was entered into between the parties, providing that, in addition to the rental of $15 per annum which was provided for in the first paper, the lessees should do certain work upon the farm or land of the lessor, that stumps should be pulled in a certain locality, logs pulled out of the river, and certain fences and bridges built. It was the evident intention that these two agreements should be construed together and constitute one lease. On October 1, the Moylan Brothers sold their right to this lease to the Tongue Point Company, and after notice to quit, the Tongue Point Company sold to the Hammond Lumber Company, respondent in this action.

Of course, if this were the ordinary case of an unacknowledged lease for a fixed period beyond one year, with provision for yearly rental, there would be no escape from the conclusion that it was, in effect, an oral lease, void under the statute of frauds—at least, void so far as the duration of the lease is concerned; for the statute itself provides that, in such case, where possession is taken thereunder, it shall be construed to be a tenancy from month to month or from period to period and can be terminated by the lessee by giving thirty days' notice preceding the end of such period. So that it will be seen that the statute does not make the lease void *in toto*, and this was all that was decided in *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852, a case which is strongly relied upon by appellant. There the defense of part performance was interposed, and the equitable doctrine was recognized by this court, but it was held that, under the findings of fact, the evidence not having been brought up, there was no proof that the expenditures made upon the leasehold estate by the lessee increased the rental value. In this case there is no question of increasing the rental value of the land leased. The claim is that the case is taken out of the statute by possession and by performing all that the lessees agreed to perform as a part payment of the rental charged.

The authorities are generally to the effect that, if the rental is paid in advance for the whole period agreed upon, even though the period is for more than a year, the lessee cannot be ejected until the expiration of the term paid for, on the principle that any other construction of the statute would aid in the perpetration rather than the prevention of fraud. While the process may seem a little involved and lacking in directness, it proceeds upon the theory that the party invoking the statute is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon

the contract itself. The same principle ought to apply here. The court found, and the evidence amply sustains the finding, that the lessees were put in possession; that the railroad was built upon the right of way which was leased, at a cost of about $40,000; that the lessees undertook to comply with the terms of the second instrument, and did pull stumps out of the bottom land, remove logs therefrom and, to a certain extent, cleared the creek free of logs and built a bridge across the creek and did other work until they were told by the plaintiff to vacate. So that the case falls squarely within the rule that possession and part performance take the case out of the statute of frauds. It would be highly inequitable to allow the appellant the benefit of all the work which was provided for in the contract (and the testimony shows that the work done represented a large amount of money) and at the same time to eject the respondent from the right of way the granting of which was the cause of the benefit conferred on appellant. We are convinced, from an investigation of all the testimony in this case, not only that the work agreed upon was done by the lessees until they were driven from the premises by the violent language and orders of the appellant, but that the real cause of appellant's attempt to terminate the lease was his discovery of the fact that the lease had not been acknowledged and that the acknowledgment was, as he thought, a prerequisite to the validity of a lease.

The respondent complains of the action of the court in not granting it a decree of specific performance, but the respondent has not appealed in this case, and we are not able to agree with its contention that, notwithstanding it has not appealed, this being a case which is heard *de novo*, this court will grant such a judgment as ought to have been granted by the court in the first instance; for the righting of wrongs is what an appeal is given for, and the respondent should not obtain a more favorable judgment here than it obtained below when it received it without objection. In

other words, it ought not to profit by the action of the appellant who has sought by appeal to improve his position.

The judgment will therefore be affirmed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

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[No. 8336. Department Two. February 11, 1910.]

ELSA ELIZABETH MERZ *et al.*, *Respondents*, v. THERESA MEHNER *et al.*, *Appellants*.[1]

PARTIES—DEFENDANTS—TRUSTEES—GUARDIANS—MECHANICS' LIENS. Under Rem. & Bal. Code, § 180, authorizing the trustee of an express trust to sue without joining the *cestui que* trust, the guardian of infants, to whom a deed was made as trustee without limitations, may be sued as the holder of the legal title, without joining the infants, in an action to foreclose a mechanics' lien.

JUDGMENT—COLLATERAL ATTACK — SERVICE — PROOF — BURDEN OF PROOF. In a collateral attack upon a judgment for want of service of process, it is immaterial that there was no proper proof of the genuineness of the defendant's written admission of service, where the court found that personal service was made, the burden being upon defendant to establish want of service, and not want of proper proof of service.

Appeal from a judgment of the superior court for Kitsap county, Frater, J., entered January 6, 1909, upon findings in favor of the plaintiffs, in an action to quiet title and for partition, after a trial on the merits. Reversed.

*J. W. Bryan*, for appellants.

*B. B. Crawford*, for respondents.

DUNBAR, J.—It is difficult to make a condensed statement of this case; but, as nearly as we can gather its history from the somewhat confused record which is presented, the controversy is over the disposition of certain real property involved in a divorce proceeding between Anna Merz and her

[1]Reported in 106 Pac. 1118.

then husband L. C. Merz. Certain property, including the property in question, was awarded to Anna Merz on condition that she deed a one-half interest in lots 12, 13, and 14, of block 1, of Bremerton, to the minor heirs of herself and L. C. Merz. There are other conditions imposed which are not involved in this case. In accordance with this order, a trust deed to E. B. Benson, who had been appointed guardian of the minor children, was executed for the one-half interest in the lots aforesaid. Afterwards certain liens were prosecuted against the property in question, for materials and labor furnished on the same. On these, judgments were obtained which went to execution, and the property was sold to satisfy them. The appellants' title is derived from the purchasers at the sheriff's sale under these lien judgments, and from a warranty deed from Anna Merz. The title in the Merzes at the time of the divorce proceedings is not questioned. Various suits were commenced but, being with reference to the same property and the same issues, they were consolidated and tried together, the plaintiffs in this case being the heirs above mentioned, by B. B. Crawford, their guardian *ad litem*, and the defendants being Theresa Mehner *et al.*, the appellants here.

As we view it, the material allegation of the complaint is that the decree in the lien foreclosure cases and the sale thereunder were void, so far as the plaintiffs are concerned, for the reason that the court did not acquire jurisdiction of the plaintiffs or their interest in said property, by the service of summons and complaint, as required by law. Some other objections were made to the lien notices, but it is not contended that they were jurisdictional, and of course they were cured by the judgment, even conceding—which we do not—that they were in any way objectionable. The prayer of the complaint was, that the deeds aforesaid be declared void; that the title to the one-half interest be confirmed in the plaintiffs, and that the plaintiffs have judgment for an accounting and partition and division of the premises, or in

the alternative for a sale of the premises and a division of the proceeds. Issues were presented and the case tried and, after voluminous findings of fact, including the foreclosure sale as above mentioned, the court concluded that the aforesaid sales were made without jurisdiction and were therefore void, and that therefore the interest of the plaintiffs was never divested, and a decree was entered confirming their title as prayed for, with other minor directions in regard to the disposition of the estate.

The respondents insist that the only and real question involved herein is whether a litigant in a divorce case can secure the awarding to her of certain property by making promises to the trial court to give her minor children half of either the property or the proceeds thereof, and after securing the possession of the same and appropriating the entire income as long as possible, manipulate matters so as to deprive the minor children of their entire interest in the property in bold and open fraud of the court. That might be a real question in a case properly brought by heirs against the mother, but certainly the real question in this case is, what are the rights of the purchasers at the foreclosure sale, or of their grantees. Passing the consideration of the demurrer interposed to the complaint, for the reason that it will probably expedite the final adjustment of the trouble involved by deciding the case upon the merits, the whole contention that the same was void is based upon the finding that in the foreclosure suit the signature of Benson, the guardian, who accepted service upon the back of the summons and complaint, was not proven to be genuine and that there was no other service made upon the minor heirs, and that service upon Benson was not sufficient in any event. It must be borne in mind that, under the terms of the deed to Benson as trustee without any limitations, he was constituted a trustee of an express trust. The legal title to the land conveyed was in him, and under the express provisions of our statute, Rem. & Bal. Code, § 180, he is authorized to sue without joining the

person for whose benefit the suit is prosecuted. If that is true, it necessarily follows that he could be sued as a representative of the *cestui que trust*. *Carr v. Cohn*, 44 Wash. 586, 87 Pac. 926; *Doe v. Tenino Coal & Iron Co.*, 43 Wash. 523, 86 Pac. 938.

But, conceding him to be a proper person to make service upon, the contention is that, while he accepted service on the back of the summons, there was no proof of the genuineness of his signature; and *Downs v. Board of Directors School Dist. No. 1*, 4 Wash. 309, 30 Pac. 147, is relied on to sustain the contention that such proof was necessary to give the court jurisdiction. But that was where the case came up on appeal from the refusal of the court to enter the judgment demanded, the court holding that there had been no proof of service. But this is a collateral attack upon a judgment, collateral at least in the sense that the judgment is attacked in a separate action and not on appeal, and therefore such judgment imports verity. This rule is so well established in this jurisdiction that the citation of authorities is not called for. It is doubtless true that, even in such a case, the right to assail the verity of a judgment by an affirmative showing that the service was not actually made is still available, the burden of proof being upon the party alleging the invalidity of the judgment. But there is a wide difference between an attempt to prove that no service had been made and an attempt to prove that there had not been proper proof of such service. That was all that was attempted in this case, and such proof would not be admissible, under the authorities, for the purpose of overcoming the verity which the judgment imports. In fact, in this case the court found the essential thing, viz., that the service of the summons and complaint was actually made upon E. B. Benson, guardian of the estate of said minors, by having the said E. B. Benson accept service of same upon the back thereof in writing, but further found that no affidavit of the service of the summons and complaint upon the said Benson had been filed in said cause. So that

it will be seen that the controversy that is raised over this question is not a controversy as to whether service had been made. We think the contention that the court acted without jurisdiction is not tenable, and that the court erred in so finding. It follows that the defendants' title to lots 13 and 14 should not be disturbed.

But the title to the one-half interest in lot 12 is not involved in any foreclosure proceeding, and we are not impressed with the contention of the mother, Anna Merz, that she was in duress when she made the trust deed to Benson of the one-half interest in lot 12, or that she was so ignorant of her rights in the premises that the deed was induced by fraud. So far as the title to the one-half interest in lot 12 is concerned, it will remain in the respondents. This division of the property will necessitate an accounting to determine what portion of the rents and profits the respondents are entitled to. There are not sufficient data in the record upon which this court can intelligently base a judgment upon that question.

The judgment will be reversed, and the cause remanded with instructions to determine the just proportion of the rents and profits due the heirs, and to enter judgment accordingly. The appellants will recover costs in this court.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8139. *En Banc.* February 14, 1910.]

# Domenico Giuricevic, *Respondent*, v. The City of Tacoma, *Appellant*.[1]

Municipal Corporations — Actions — Claims for Injuries — Pleading. A complaint in an action against a city for personal injuries fails to state that the claim required by charter provisions was filed with the city council, as against a demurrer, where it merely alleges that the plaintiff caused the city and its officers and agents to be fully informed of the time, place, cause, etc., of the injury.

Same — Notice of Claim — Defects in Street — Fall of Pole. A charter provision requiring claims to be filed with the city council for injuries to the person caused by defects, want of repair, or obstructions in streets, does not apply to a claim against a city for negligently allowing an electric light pole to fall upon a servant of the city grading a street, as the provisions must be strictly construed, and not extended beyond its terms.

Same — Notice of Claim — Injuries to Servant of City — Safe Place to Work. A charter provision requiring notice of claims to be filed with the city council for injuries to the person caused by defects, want of repair, or obstructions in streets, has no application to injuries to a servant of the city injured by reason of the city's failure to furnish a safe place to work; as the city is presumed to have notice of injury to its servants, and the purpose of the provision is to give notice of spurious claims.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 9, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by an employee through the negligent fall of a pole. Affirmed.

*T. L. Stiles*, *F. R. Baker*, and *F. A. Latcham*, for appellant.

*Ellis, Fletcher & Evans*, for respondent.

Gose, J.—This suit was brought to recover for personal injuries. From a verdict and judgment for the plaintiff, the defendant has appealed.

[1]Reported in 106 Pac. 908.

The complaint states that, at the time the injury was received, the respondent was working for the city in grading a street in which the city had placed a large electric light pole; that, in grading, the city negligently caused the earth to be excavated around the pole to such an extent that it was dangerous and liable to fall; that the city had notice of its dangerous condition prior to the injury; that the respondent, at the instance of the city, was working near the pole, filling wagons with gravel, and while so doing, and without any knowledge of its dangerous condition, the pole fell, striking the respondent and inflicting upon him a permanent injury. The complaint further states:

"That immediately after said injury, plaintiff caused the city of Tacoma and its officers and agents to be fully informed of the time, place, cause, nature, and extent of his said injury, and the said city of Tacoma and its officers and agents immediately investigated said injury and the cause thereof and the extent of the same."

The appellant demurred to the complaint on the ground, among others, that it does not state facts sufficient to constitute a cause of action. The demurrer being overruled, issue was joined, and the case tried to a jury with the result stated.

The case is brought here on the record, and the single question presented is, whether the complaint states a cause of action. Section 215 of the revised city charter of the city of Tacoma provides:

"All claims for injuries to the person, alleged to have been caused or sustained by reason of defects, want of repair or obstruction of any of the highways, streets, alleys, sidewalks, or crosswalks of the city, shall be presented in writing to the city council within thirty days after such injuries shall be alleged to have been received. Such writing shall state the time, place, cause, nature, and extent of the alleged injuries so far as practicable, and shall be verified by affidavit of the claimant to the effect that the same is true. The omission to present any such claim in the manner or within the time

in this section provided shall be a bar to an action against said city therefor."

The appellant first urges that the complaint is subject to a demurrer because it does not state that the claim was presented to the city council. The respondent contends that, whilst the complaint may have been defective as against a motion to make it more definite and certain, as to a demurrer every reasonable intendment and presumption should be indulged to support it, and that when this is done it sufficiently appears that notice was given to the city council. We grant the rule of liberal interpretation, but with this indulgence we do not think the complaint states that notice was given to the city council. It was a simple matter to plead the notice, if it had in fact been given. The complaint has the appearance of a studied effort to avoid, rather than to state, the giving of the notice to the council.

The respondent next contends that the injury did not result from any defect, want of repair, or obstruction in the street as a place of travel; that the fact that the injury happened in the street is a mere incident, and that the charter provision is inapplicable. We think this view must prevail. The giving of a notice to the city or its governing body upon claims for injuries by tort is not necessary as a condition precedent to an action thereon against the municipality, unless expressly required by statute or charter. 28 Cyc. 1447. A charter or statute requiring a notice or presentment of a claim, as a condition precedent to the commencement of an action, requires a strict construction, and cannot be extended by implication beyond its terms. 28 Cyc. 1450.

In *Pye v. Mankato*, 38 Minn. 536, 38 N. W. 621, the complaint charged the city with liability on account of the raising of the grade of certain streets so as to form embankments obstructing a water course which crossed the same, by reason of which, and because the gutters provided for carrying off the water were insufficient for that purpose, water was collected and discharged upon the plaintiff's premises.

There was a special statute which provided that no action could be maintained against the city of Mankato "on account of any injury received by means of any defect in the condition of any bridge, street, sidewalk, or thoroughfare, unless such action shall be commenced within one year from the happening of the injury; nor unless notice shall have first been given in writing to the mayor of said city within thirty days, of the occurrence of such injury or damage, stating the place where and the time when such injury was received." The complaint did not show a compliance with the statute, and was demurred to for that reason. The court held that the word "defect" had reference to the usefulness and safety of the streets for the purposes of travel, but that it did not include injuries resulting to adjacent property from conditions which did not render the street defective as such, and that the injury "had no natural or necessary relation to the fact that the places where the alleged acts were done were public streets."

In *Moran v. St. Paul*, 54 Minn. 279, 56 N. W. 80, the complaint alleged that the property adjoining the street had been injured by water escaping from a defective water pipe in one of the public streets. There was no averment in the complaint that a written notice of the plaintiff's claim for damages had been served upon the mayor or city clerk, as required by the defendant's charter, and it was urged upon demurrer to the complaint that a cause of action was not stated. The court held that the words in the charter, "any defect in the condition of any . . . street." referred to "their usefulness and safety for the purpose of travel."

In *McIntee v. Middletown*, 80 App. Div. 434, 81 N. Y. Supp. 124, the plaintiff was injured by the caving of the dirt while digging a trench for a sewer in a street in the city. The court, in holding that the charter provision requiring notice to be served on the common council did not apply, said: "and the mere fact that this sewer happened to be in the highway does not bring it within the letter or the spirit of the provision of the charter."

The respondent next contends that the charter does not require or contemplate the presentation of claims arising from the failure of the city to furnish its servant a reasonably safe place in which to work. This question received consideration in *Kelly v. Faribault*, 95 Minn. 293, 104 N. W. 231, where the plaintiff was injured while at work in a trench in a public street. It was charged that the trench was defective in its construction and was not properly braced, by reason of which the loose earth fell upon and injured the plaintiff. The plaintiff did not serve notice as provided by law for injuries resulting from a defective street. The court held that the law requiring notice to the city had no application to its duty as a master to furnish its servant a reasonably safe place in which to work; that the purpose of the law requiring notice was to give the municipality an opportunity to investigate and protect itself against fictitious claims. We think that, while the claim in the instant case is within the letter, it is clearly without the spirit of the charter provision. In arriving at the intent of a law it is proper to consider the mischief sought to be met. Clearly the purpose of the notice is to enable the city to protect itself against spurious and fraudulent claims. In this case the reason for the notice is absent, for it must be presumed that the city had notice of the injury to its servant. *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025, is distinguishable. The charter of the city of Seattle required "all claims for damages against the city" to be presented.

The judgment will be affirmed.

Fullerton, Chadwick, Dunbar, Mount, Crow, and Parker, JJ., concur.

[No. 8325. Department One. February 14, 1910.]

## W. H. KINCAID, *Respondent*, v. WALLA WALLA VALLEY TRACTION COMPANY, *Appellant*.[1]

STREET RAILWAYS — STREETS — DEFECTIVE TRACKS — FRANCHISE — LIABILITY. A street railway company, under its franchise requiring it to plank the street between the rails, as well as under the common law, is liable to a traveler who, in driving across the tracks, sustains injury through the company's maintaining its rails without planking, in violation of the franchise, and negligently extending six inches above the ties unprotected except by soft yielding dirt, which gave it the appearance of safety: and it is immaterial that the street was planked at street intersections, as the traveler's right to cross the tracks is not limited to crossings.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. A new trial for newly discovered evidence is properly denied where the evidence either fails to meet the issue or is cumulative.

NEW TRIAL—DILIGENCE. In an action for injuries sustained by a traveler, who alleged that his wagon wheels came in contact with unguarded street car tracks where the company should have planked the street, lack of diligence will prevent the granting of a new trial for the newly discovered evidence of a witness who would testify that the wagon tracks indicated that the wheels did not come in contact with the rails, where it appears that the company's manager visited the scene of the accident soon after the accident and before removal of the wagon, and did not investigate to ascertain whether the wheels had come in contact with the rails.

NEW TRIAL—SECOND MOTIONS—ORDER—FINALITY. After the denial of a motion for a new trial, required to be made within a specified time, the trial court is without jurisdiction to consider another motion for a new trial.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $5,500 for personal injuries sustained by the driver of a water wagon, 64 years of age, earning four dollars per day with his team, is not excessive, where he sustained a compound comminuted fracture of the left ankle and lower part of the right leg, bones were crushed and protruded through the flesh, he was confined to his bed three months, the healing was not complete in six months, and the injury was permanent, requiring the use of a stiff shoe and crutch.

APPEAL—REVIEW—VERDICT—EVIDENCE. An objection that a verdict is not sustained by competent evidence cannot be urged where

[1]Reported in 106 Pac. 918.

the record thereof is unintelligible by reason of illustrative references to a map which the witness was evidently indicating.

Same. The verdict of a jury sustained by competent evidence will not be set aside because the appellate court might have reached a different conclusion.

Street Railways—Defective Tracks—Cause of Accident—Evidence—Sufficiency. There is sufficient evidence to sustain a verdict depending upon the fact that the left rear wheel of a water wagon came in contact with an unprotected street car rail near a street crossing, where the driver of the wagon testified that in making a turn at the crossing both left wheels of his wagon crossed the track, that the front wheel crossed back before leaving the planking at the crossing, and the rear wheel caught on the rail and slid, and the right wheel broke, although the trial judge and the appellate court doubted whether the accident could have occurred in that way; since the record fails to show physical facts that would control the verdict (Morris and Chadwick, JJ., dissenting).

New Trial—Evidence—Sufficiency. The fact that the trial judge's opinion as to the facts established differs from the opinion of the jury, as expressed by the verdict, does not require him to grant a new trial.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered March 29, 1909, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained in driving across a street car track. Affirmed.

*Rader & Barker*, for appellant.

*Sharpstein & Sharpstein*, for respondent.

Gose, J.—This is a suit to recover damages for personal injuries sustained by the plaintiff on September 26, 1908. There was a verdict and judgment in his favor for the sum of $5,500. The defendant has appealed.

The complaint in substance states that, at the time of the injury, the appellant was engaged in the operation of a street car line upon Whitman and other streets, in the city of Walla Walla; that its right to construct its tracks and to operate its road was granted by an ordinance of the city which provides that on unpaved streets it shall lay planks

outside of the rails one foot in width and flush with and against them, and that inside of the rails it shall lay planks of the same width properly champered to fit them; that Whitman street is unpaved, and that the appellant had not placed any planks or other firm substance along the rails, but had placed soft dirt adjacent to them; that the rails extended about six inches above the ties upon which they were laid; that the respondent, on the day he received the injury, was driving a team attached to a wagon, on which there was a tank containing water, on Whitman street, immediately east of its intersection with Palouse street; that he undertook to drive across the steel rail; that the wheels of the wagon caught against it, sank into the soft dirt, slid, and broke the axle of the wagon, throwing the respondent to the ground; that the tank of water rolled off the wagon onto the respondent, breaking his leg and inflicting permanent injuries.

The appellant moved to strike the following from the complaint:

"That defendant had negligently failed to place adjacent to said rails any plank or paving or other hard or firm substance on either side of either of the two parallel rails, constituting part of said system, at said place, and had negligently placed soft yielding dirt adjacent to said rails, so that the wheels of plaintiff's wagon sank into said dirt; that such planks placed as required by the ordinances hereinafter referred to would have rendered said rails and street safe for public travel and the want thereof, or of some other hard substance in lieu thereof rendered the same unsafe, all of which acts of negligence were unknown to plaintiff and that by reason thereof. . . . which ordinances contained a provision to the effect that on unpaved streets, the rails should weigh not less than fifty-six pounds to the yard in length, and that there should be a plank one foot in width to be laid flush with and against the rail, and on the inside of each rail there shall be a plank one foot in width laid parallel with and champered so as to fit the rail; that Whitman street is an unpaved street; that the defendant failed and neglected to place any of said planks in position or to lay the same at all

or to use any other substance therefor, or in any other manner to render said track safe for teams to cross the same."

The motion being overruled, appellant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer being overruled, it answered, denying any negligence on its part, and alleging affirmatively, (1) that the respondent was guilty of contributory negligence, and (2) that the ordinance referred to in the complaint provides that the planking may be waived by agreement between the city and the appellant, and that at the time the line was constructed the duty to plank was so waived. The reply put the new matter in issue, except it admitted that the ordinance contained a provision that the planking may be waived by an agreement between the city and the appellant. It is admitted that the appellant was operating a street car line in the city under an ordinance containing the provisions alleged in the complaint. It is also admitted that the track was planked on Whitman street at its intersection with Palouse street.

It is first urged that the court committed error in refusing to strike the portions of the complaint to which the motion was directed, and in overruling the demurrer. We will consider these assignments together. The argument is made that the ordinance is in the nature of a police regulation for the benefit of the city and not for the benefit of the people who travel the streets, and that the appellant is not liable to an individual for an injury resulting from its noncompliance with the conditions of the ordinance. In support of this contention it cites *Fielders v. North Jersey Street R. Co.*, 68 N. J. L. 343, 53 Atl. 404, 54 Atl. 822, 96 Am. St. 552, 59 L. R. A. 455; *Leary v. Boston El. R. Co.*, 180 Mass. 203, 62 N. E. 1, and Nellis on Street Surface Railroads, 57. In the *Fielders* case, which was a suit for damages for personal injuries, the defect which caused the injury was a hole in the street pavement between the rails of the track. Upon the

facts in the case it was held that the company was not liable to an individual for an injury sustained under an ordinance requiring all street railway companies to pave and keep in repair the spaces between the rails of the track and for one foot outside of the outer track, and that the ordinance was invalid as an assumption of the power to tax and not within the police power. As showing that it is not authority in the case at bar, we make the following excerpts from the opinion:

"There is nothing in the case to show that the pavement in question had been laid or maintained by the defendant, or that the defect resulted from any act of commission on the defendant's part. Nor is there anything to connect the defect with the defendant's rails or sleepers, or to show that anything done or omitted in the construction, maintenance, or operation of the railway produced the defect. The location of the hole between the rails is a mere circumstance, without causative significance. And the only default attributable to the defendant is the failure to repair. It is familiar law that a railway company, having the right to lay tracks in a public street, is bound, by the general principles of the common law, and without either a specific statute or ordinance or a contractual obligation, to lay its tracks in a proper manner, and to keep them in a proper state of repair. . . . But the present case is devoid of evidence to show that any liability for the repair or maintenance of the street pavement was imposed upon the defendant as a condition of its right to exercise its franchise, or that the defendant, by any contract, has undertaken such a duty."

In the *Leary* case it is conceded that, where the statute granting a charter to the street railway company provides that the company shall maintain and keep in repair the portion of the street occupied by its tracks, the company is liable to the traveler who sustains an injury through its failure to comply with such provision. Nellis, on Street Surface Railroads, at page 54, states that the rule is that the authority granting the franchise may determine and dictate in what manner and under what conditions the franchise may be enjoyed.

It will be observed that these cases are not authority for the contention that a street railway company can construct its track under a franchise imposing conditions upon which the privilege may be enjoyed, and escape liability to one who has been injured by its noncompliance with the conditions. As the learned trial court remarked, the granting of the franchise to appellant imposed upon it the duty of placing the track in a reasonably safe condition. Neither the municipality nor its creatures can place an obstruction in a street which causes an injury and be exempt from liability. This view is supported by the following cases: *Reynolds v. Great Northern R. Co.*, 40 Wash. 163, 82 Pac. 161, 111 Am. St. 883; *Gray v. Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206; *McMahon v. Second Avenue R. Co.*, 75 N. Y. 231.

In the *Reynolds* case it was held that a shipper could recover damages to live stock caused by a failure upon the part of the carrier to unload them after confinement for a period of twenty-eight consecutive hours, in violation of § 4386, U. S. Rev. Stats. In the *Gray* case the street car company was held liable for an injury resulting from its failure to maintain its rails flush with the street, as required by an ordinance of the city. In the *McMahon* case it was held that, the railroad company having contracted with the municipality to keep the streets safe for travel, and having failed to do so, one who was injured through its default had a right of action against it.

Moreover, independent of the obligation arising from the ordinance, the appellant could not so obstruct the street as to render it dangerous to travel and be exempt from liability to a person injured thereby; and the allegations in the complaint that the rails extended about six inches above the ties upon which they were placed, that they were unprotected except by soft and yielding dirt which the appellant had placed about them, and which gave the track the appearance of being safe when it was in fact dangerous, and

that the respondent, deceived by the apparent safety of the place, drove upon the rails and was injured, state a cause of action. *McMahon v. Second Avenue R. Co.*, *supra*; *Sexton v. Zett*, 44 N. Y. 430; *Wolfe v. Erie Tel. & Tel. Co.*, 33 Fed. 321; *San Antonio Rapid Transit Street R. Co. v. Limburger*, 88 Tex. 79, 30 S. W. 533, 53 Am. St. 731; *Worster v. Forty Second Street etc. R. Co.*, 50 N. Y. 203.

The fact that the track was planked at street intersections does not exempt the appellant from liability. The right of a traveler to cross a street is not limited to such points. In the *Wolfe* case the law of the street is aptly and tersely stated in the following language:

"The law of the public street is like the law of the sea,—it is the right to move on, the right to pass to and fro, without let or hindrance, other than such temporary stoppages in transit as are incident to the business of travel."

It is next urged that the court erred in refusing to grant a new trial, (1) because of newly discovered evidence; (2) because the damages are excessive; and (3) because of the insufficiency of the evidence to support the verdict. We will consider these points in the order stated.

The newly discovered evidence relied upon is that a witness was at the place where the accident occurred before the respondent had been removed; that he examined the surroundings with the view of determining the cause of the accident; that he observed two parallel wagon tracks crossing the street car track at an angle, passing off the track on Whitman street a few feet east of its intersection with Palouse street; that he did not see any wagon track south of the south rail. Palouse street runs north and south, and Whitman street runs east and west. The car track, as we have stated, is on the latter street. The respondent testified, that he was driving a water wagon north on Palouse street; that he turned east on Whitman street where it intersects with Palouse street to get south of the street car track; that in making the turn the two left wheels passed over the south rail of

the street car track; that the left hind wheel caught on the inside of the rail and caused the accident. The accident occurred on Saturday. A witness for respondent testified that he examined the place of the accident the following Monday morning; that he saw a wheel mark indicating that the wheel had slipped a distance of about one and one-half feet inside of the car rail and two or three feet east of the planking. Another of the respondent's witnesses testified that he was at this place on Sunday following the accident, and that he saw marks indicating that the wheel had slipped against the rail. The newly discovered evidence did not meet this issue. There is a diagram attached to the affidavit, showing that the track which the witness saw passed onto the street car track from the north side of Palouse street, passing off the track on the south side of Whitman street east of the intersection of the streets. These were not the tracks mentioned by the respondent's witnesses. If the evidence relied upon for a new trial meets the issue, it was cumulative.

The record, however, shows a lack of diligence on the part of the appellant. Its manager testified that, on the afternoon of the day of the accident, as soon as he heard of it, he went to the place where it occurred and made an examination of the surroundings. The wagon and tank had not then been removed. There is no suggestion in his testimony that he examined the track to ascertain whether the wagon had come in contact with the rails. Due diligence required the appellant to begin its inquiry when it had notice that the accident may have resulted from its negligence. If the respondent's wagon did not come in contact with the rails, and there was no soft dirt about them, the physical evidence was not present to establish that fact. The appellant did not make the investigation which ordinary prudence demanded.

The judgment was entered March 29, a motion for a new trial filed March 30, and denied on April 9. Thereafter, and

on April 20, the appellant filed a second motion for a new trial, together with certain affidavits. In passing on this motion the court remarked that, having denied a motion for a new trial, he had no jurisdiction to hear a second motion; that if he could hear a second motion, he could hear a dozen, and a judgment would have no finality as against motions for a new trial. We think the court announced the correct rule. The statute permits a motion for a new trial to be filed within a fixed time. When it has been denied, the judgment becomes final as against further like motions. The statute is not susceptible of any other reasonable interpretation. If it were, there would be no finality to a judgment so long as the losing party desired to attack it by such motions. This view is supported by analogy, by the cases holding that but one motion to vacate a judgment can be interposed, and that the remedy of the moving party is by appeal if his motion is denied. See, *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, where the cases from this court are collated.

We do not think the damages are excessive. The respondent, at the time he received the injury, was sixty-four years of age, in good health, and earning with his team four dollars per day. An examination of the evidence discloses that he was confined to his bed about three months; that he had a compound, comminuted fracture of the left ankle and the lower part of the right leg; that the bones were crushed into fragments and protruded through the flesh in three places; that the process of healing was not complete at the time of the trial, six months after the injury; that the injury is permanent; that he will be able to get around by the use of a stiff shoe with the aid of a crutch, and as the doctor expressed it, "that is about all that he can ever expect to do." With such an injury, if he is to be allowed anything for pain and suffering, the damages awarded are not excessive. The remarks of the trial judge upon the amount of damages will be considered later.

It is next urged that there is no competent evidence tending to show that the left rear wheel of the wagon came in contact with the steel rail, and it is argued that the respondent's testimony shows that the left front wheel passed off of the track at the east end of the planking, and that in making a turn to the right and to the east the left rear wheel would not go as far north as the left front wheel had gone, and that the rear wheel would have left the plank at some point on the planking west of the point where the front wheel left the track. The respondent while testifying was evidently indicating upon a map the point where the front wheel passed on and off the street car track, and a part of his testimony is therefore unintelligible, as will be seen from the following questions and answers, which are illustrative of a considerable portion of his testimony:

"Q. You are not sure whether your left front wheel then passed over the south rail or not? A. Well, I am pretty sure it passed over it, but then I turned so short here when I came back I think I went off right here. Q. And when the left front wheel passed over the rail, then it was still on the planked portion of the street? A. Yes, sir."

We cannot determine from this testimony whether the witness had reference to the passing of the wheel to the north or its return to the south of the rail.

Argument is also made that there was a defect in the left rear wheel, and that if it had come in contact with the rail, it and not the right wheel would have broken. The record, however, shows that there was a slope toward the curbing, and that the tank was only partially filled with water. From this testimony the jury could conclude that the water shifted to the lower side of the tank, causing the right wheel to break. We cannot say from the record that there are physical facts present which should control the verdict. As we have stated, the court directed the jury that there could be no recovery if the respondent did not drive his wagon on the track where the planking should have been. Whilst, if it was an original question, the writer, as he un-

derstands the testimony, would be of the opinion that the wagon did not come in contact with the rail, there is competent testimony upon which the jury was warranted in reaching a different conclusion, and we cannot therefore disturb the verdict.

In passing on the motion for a new trial the trial judge said that the evidence impressed him with the belief that the wagon did not pass over the unplanked part of the track, but that the wheel broke from the weight of the load, the defective axle, and the inclination of the surface of the street toward the parking, and that he was inclined to regard the amount of damages awarded by the jury as "more than they ought to be." He further said: "Still the evidence was conflicting, . . . and the jury have reached a different conclusion. . . . Ten men are much less likely to be mistaken in a matter of this kind than one man. . . . I do not feel warranted in granting a new trial on either of these grounds." It is contended that the view entertained by the trial judge on these questions made it imperative upon him to grant a new trial. It requires no argument to show that the trial judge is not required to grant a new trial in every case where his opinion upon the facts differs from the opinion of the jury as expressed in the verdict. *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4; *Columbia and Cowlitz River Boom and Rafting Co. v. Hutchinson*, 56 Wash. 323, 105 Pac. 636.

Finding no error in the record, the judgment will be affirmed.

Rudkin, C. J., and Fullerton, J., concur.

Morris, J. (dissenting)—I dissent. It is to my mind conclusively shown by the physical facts surrounding the accident that it could not have occurred in the manner contended for by respondent. If, as testified by respondent—and his is the only testimony in the record upon the point—his left front wheel passed over the rail while it was still on the planked portion of the street, it would be physically impossible for the

rear wheel to describe a greater arc than the front wheel and leave the rail on the unplanked portion of the street; and the accident could not have happened as respondent describes it unless such was the case. It is argued by respondent that it would be possible for the team and wagon to straighten out so as to make the hind wheel follow in the track of the front wheel. Admitted; but in so doing the wagon would have been moved some distance beyond the crossing, and both the front and hind wheels would have caught inside the rail beyond the planking. The wagon broke down within three feet of the crossing and fell partly on the curb which was fourteen feet from the rail. To uphold the verdict we must hold that, in going a distance of three feet, the hind wheel caught on the rail and the wagon fell over so as to cover a distance sidewise of from ten to fourteen feet; at any rate, far enough over so that an automobile passed between it and the rail.

It is to my mind clearly shown by the evidence and the attendant facts that the wheel broke in passing over the crossing where there was a drop of some inches. There is no other theory that can account for the position of the wagon upon the ground after the break. The reading of the record seems to have convinced the writer of the majority opinion that the wagon did not come in contact with the rail. The judge who tried the case gives it as his belief, after hearing the evidence and being familiar with the situation locally, that the wagon did not pass over the unplanked part of the track. Juries are sometimes moved, by facts that should not control them, to go outside the evidence and render verdicts which are contradicted by all the physical and uncontrovertible facts in the case. Whenever such fact is apparent to either the trial or appellate court, it should unhesitatingly speak and order a new trial where a verdict may be rendered upon the evidence, and thus justice be done all parties.

The judgment should be reversed and a new trial ordered.

CHADWICK, J., concurs with MORRIS, J.

[No. 8460. Department Two. February 14, 1910.]

# M. C. HEINEMANN *et al.*, *Respondents*, v. J. T. SULLIVAN *et al.*, *Appellants*.[1]

HUSBAND AND WIFE—CONTRACTS—VENDOR AND PURCHASER—RATIFICATION BY WIFE. The execution of a deed by the wife, within the time required by a contract of sale made by the husband alone, ratifies the contract and renders it binding on the vendee.

VENDOR AND PURCHASER—ALTERATION OF CONTRACT—RESCISSION BY VENDEE—ESTOPPEL. A contract for the sale of land cannot be rescinded by the vendee because of unauthorized alterations in the contract, where the alterations made were for his benefit and he was informed thereof and made no objection at the time.

ALTERATION OF INSTRUMENTS—INSTRUCTIONS—MATERIALITY. Upon an issue as to whether material alterations were made in a contract for the sale of land, an instruction assuming that the alteration would be material if made without consent of the vendee does not submit the materiality of the alteration to the jury.

SAME. Upon an issue as to whether material alterations were made in a contract for the sale of land, an instruction authorizing the jury to find for the defendant if the plaintiffs signed the contract with alterations "making a deviation in a material matter," is not objectionable as submitting the question of alterations, which were admitted, where there was evidence to support the contention that the alterations were made upon the authority of the defendant, the contest being upon the question of such assent.

SAME. Upon a contest as to whether the vendee consented to alterations in a contract for the sale of land, an instruction to the effect that the vendee would not be liable if material alterations were made, unless the matters inserted were part of the original agreement, is not so broad as to inform the jury that the vendors had a right to alter a written contract to conform to a previous oral agreement without the consent of the vendee.

Appeal from a judgment of the superior court for King county, Ronald, J., entered June 26, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action upon contract. Affirmed.

*Sullivan & Stevens*, for appellants.

*Hastings & Stedman* and *Walter B. Beals*, for respondents.

[1]Reported in 106 Pac. 911.

MOUNT, J.—This action was brought by the respondents to recover upon a check of $2,500, drawn by the appellant J. T. Sullivan on the Scandinavian American Bank of Seattle, in favor of the Perky Investment Company, and indorsed and delivered by that company to the respondents. The case was tried to the court and a jury. Verdict was returned in favor of the plaintiffs. The defendants have appealed.

It appears that the respondents as copartners were the owners of lot 10, block 24, of Compton's First Addition to Seattle, upon which lot was located a three-story and basement apartment house. Respondents desired to sell this property, and listed the same with the Perky Investment Company, real estate brokers, to be sold at the price of $60,000. Mr. Sullivan examined the property and made an offer of $56,500 therefor, and agreed with the Perky Investment Company that, if that company would procure the owners to sell the property to him at that price for cash, less a mortgage against the property, he would pay the investment company $500 toward their commissions. Mr. Sullivan thereupon issued the check for $2,500 in favor of the Perky Investment Company, to be delivered to the respondents as earnest money when the respondents should sign a contract agreeing to sell the property to the appellant for the sum of $56,500. Contracts were prepared in the form of a receipt, which recited that the Perky Investment Company,

"Received from J. T. Sullivan, hereinafter called the purchaser, the sum of $2,500 as earnest money and in part payment for the purchase of certain real estate in King county, state of Washington, and particularly described as follows, to wit: Lot numbered 10 in block 24, Compton's First addition to the city of Seattle, having thereon an apartment house known as The Bancroft, together with any and all improvements thereon, which we have this day sold to said purchaser for the sum of $56,500."

The receipt contained other provisions not material here. This receipt was signed by the Perky Investment Company, and also by Mr. Sullivan as follows: "I hereby agree to

purchase such property on the above terms and pay $56,500 as specified above. J. T. Sullivan, Purchaser." The Perky Investment Company took these receipts, which were executed in triplicate, and prevailed upon the respondents to agree to sell the property to Mr. Sullivan upon the terms stated. When Mr. Sullivan agreed to purchase the property, he was informed that carpets in the halls, gas ranges, window blinds, and certain fixtures in the building were included therein, but the receipts prepared for and signed by him made no mention of these items, which were worth about $800. When respondents agreed to accept the offer of Mr. Sullivan, it was upon condition that certain tools, lumber, nails, and coal stored in the basement were not included. Thereupon these words were inserted in the receipt by Mr. Perky, after the word "Bancroft," to wit:

"Including all carpets and fixtures of any nature whatsoever, but excepting any personal tools, together with some lumber and nails, which are the personal property of sellers, purchaser is to pay seller for coal in basement at time of transfer of deed."

The respondents thereupon signed the following statement upon the receipt: "I hereby approve the above sale on the terms and conditions as hereinabove set out, and acknowledge receipt of $2,500, and will pay Perky Investment Company $750 as commission." Mr. Perky of the Perky Investment Company thereupon called Mr. Sullivan to the telephone, and explained that the receipt had thus been modified and that the respondents had agreed to sell to him upon the terms stated. Mr. Sullivan made no objections thereto. Upon the witness stand Mr. Sullivan admitted being called to the telephone, but denied that he assented to the modification.

When respondents had executed the contract as stated, the Perky Investment Company indorsed the $2,500 check, and delivered the same to the respondents as earnest money. This occurred on Saturday evening. The next day Mr. Sullivan took Mr. Perky, who had concluded the contract, out

for a ride in an automobile. Nothing was said at that time about the contract. On the next Monday morning, Mr. Sullivan stopped payment of the check, and when it was presented at the bank a little later that day by respondents, payment was refused. Soon thereafter, and on the same day, Mr. Sullivan and Mr. Heinemann met in the office of the Perky Investment Company, and Mr. Sullivan stated that he had supposed the building was a solid brick building, but that he had learned it was of a brick veneer construction, and therefore had stopped payment on the check and concluded not to complete the purchase. He made no objection on account of the interlineation or changes in the contract, and confessed that no misrepresentations had been made to him about the building, and that he had examined the building personally before he had agreed to purchase it. Thereafter this action was begun. Afterwards, and within the time provided for in the contract, an abstract of title was furnished and a deed of the real estate and a bill of sale of all personal property were tendered to the appellant, which tender was refused. Defenses to the check were attempted upon the ground that, (1) the agreements were not signed by the wives of the respondents; (2) misrepresentations in the character of the construction of the building; and (3) that the receipt above mentioned was a written agreement for the purchase of the property, and that the same was altered before acceptance by the respondents, and appellants did not assent to such alteration, and there was therefore no consideration for the check.

The facts above stated very clearly show that there is no merit in any of these defenses. Even if it were necessary for the wives of the respondents to sign the contract, they executed a deed within the time required by the contract, and therefore ratified the same. The appellants, however, did not refuse to complete the contract for that reason at the time they attempted to rescind the same. Whether there were misrepresentations in regard to the character of the con-

struction of the building was a disputed question, and the finding of the jury is conclusive upon that question. The great weight of the evidence is clearly against the appellants upon the question of misrepresentation. The alterations made were almost entirely for the benefit of the appellant. These alterations included $800 worth of property for the appellant, and excluded coal of the value of about $17 reserved to the respondents. It stands to reason, therefore, that no serious objection would have been made by the appellant on that account, and it is admitted that, when the parties came together after interlineations, no objection was made to the contract for that reason. The sole objection was made upon the ground that the character of the building was different from what the appellant supposed it to be. The jury found, and the evidence shows, that the appellant was informed of the alterations in the contract, and consented thereto. The burden was upon the appellants to sustain at least one of these defenses, in order to avoid payment of the check. There was ample evidence to go to the jury upon the questions presented, and the court therefore did not err in refusing to direct a verdict for the appellant.

The court, in instructing the jury in regard to the defense based upon the alleged alteration of the contract, said:

"On this defense I charge you that, if the defendants have satisfied you by a preponderance of the evidence that the check was made to be delivered by the Perky Investment Company on condition only that the plaintiffs execute a certain agreement, and not to be delivered otherwise, and if the plaintiffs did not sign such agreement or signed the same with alterations or insertions therein, making a deviation in a material matter from the agreement as signed by the defendants, then your verdict will be for the defendants, unless the plaintiffs have further satisfied you by a preponderance of the testimony that the matters so inserted, or the alterations, were in fact a part of the original agreement between Sullivan and the Perky Investment Company, and were omitted from the three drafts or triplicates signed by the

defendants, and were afterwards put in to cure the mistake or to make the agreements signed by plaintiffs conform to the actual agreement made by Sullivan and the Perky Investment Company."

Appellants argue that the first part of this instruction, down to the word "unless," submits to the jury the question whether the alteration was material, and also whether the alteration was in fact made, and that this was error because the materiality of the alteration was a question for the court and not for the jury and because the alteration was an admitted fact. The instruction does not so state and was not so intended. It very clearly assumes that the alteration was material if made without the knowledge or consent of appellant. The insertion of certain words in the contract after it was signed by Mr. Sullivan was admitted, but it was claimed that the words were inserted by authority of Mr. Sullivan and there was evidence supporting this claim. This made a question for the jury and the instruction properly submits that question. It is claimed that the latter part of the instruction informed the jury that the respondents had the right, without the assent of the appellant, to alter the written contract to conform to a previous oral agreement. The instruction is not so broad as that. It does not state that respondents had a right to alter the agreement without the assent of the appellant. The contest upon this point was upon the question whether appellant assented or not. The respondents certainly had a right to make the change before they bound themselves, and if afterwards the appellant acquiesced or made no objection on that account, appellants were undoubtedly bound by the alteration. The Perky Investment Company were agents of the appellant for the purpose of procuring the contract to be signed by the respondents. This was admitted and, unless the appellants refused to ratify after they were informed of the change made, they were clearly bound by the contract as finally concluded. This

is clearly what the instruction means, and it was therefore not erroneous.

We find no error in the record, and the judgment is therefore affirmed.

CROW, PARKER, and DUNBAR, JJ., concur.

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[No. 8568. Department Two. February 15, 1910.]

NATALE LOMBARDO, *Respondent*, v. A. LOMBARDINI, *as Administrator etc., Appellant.*[1]

ALTERATION OF INSTRUMENTS—PROMISSORY NOTE—CONTRADICTORY DATES—ALTERATION—MATERIALITY. Where a promissory note, due one year after, was executed October 24th, 1902, but by mistake in filling a printed blank the date was written as 1892, a statement plainly written in ink that the note was due October 24th, 1903, contradicts and controls the printed date line; hence it was not a material alteration for the payee to change the printed figures of the date line to 1902.

Appeal from a judgment of the superior court for King county, Ronald, J., entered July 2, 1909, upon the verdict of a jury rendered in favor of the defendant, in an action upon a promissory note. Affirmed.

*Fred H. Peterson, Philip D. Macbride*, and *Vince H. Faben*, for appellant.

*Karr & Gregory*, for respondent.

MOUNT, J.—Respondent brought this action to recover upon a promissory note. The cause was tried to the court and a jury, and resulted in a verdict and judgment in favor of the plaintiff for the face of the note, with interest as provided therein. Defendant has appealed.

The complaint alleged:

"That on the 24th day of October, 1902, the said W. Lombardini and J. Lombardini made a certain promissory note in writing bearing date October 24, 1892.

[1]Reported in 106 Pac. 907.

"(4) That the date of 1892 is a mistake of the scrivener who wrote the note, and that said note was made on an old form and due to a mistake the date was given as 1892 instead of 1902, the correct date of said note.

"(5) That since said date plaintiff has changed the date of said note to read 1902, which is the correct date of said note, said note being in words and figures as follows, to wit:"

Then follows a copy of the note. The principal contention at the trial of the cause, and the main point made here, is that this alteration in the date line of the note avoided it. The original note was introduced in evidence, which shows upon its face that it was written upon a blank form. In the date line at the top of the note the words "Seattle, Wash." and the figures "189" were printed with a dotted blank line between them, thus: "Seattle, Wash.,.....189." The scrivener inserted the words "October 24th" in ink on the dotted line, and the figure "2" also in ink after the printed figures "189," making the date line read "Seattle, Wash., October 24th, 1892." On the last line of the note the word "Due" was printed, followed by a dotted line. The scrivener inserted in ink the words "October 24th, 1903," on that line. The note recites that it was payable "one year after date." It was conceded upon the trial that counsel for the plaintiff at the time he prepared the complaint drew a pen through the printed figures "189" and above them wrote the figures "190." It is argued by the appellant that this was a material alteration of the note, and avoided it. Numerous authorities are cited to the effect that, where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is void as against the party who has not himself made, authorized, or consented to the alteration, and section 124 of the Laws of 1899, page 362, is cited to the same effect (Rem. & Bal. Code, § 3514). Appellant relies upon section 125 of the same act (*Id.*, § 3515), which defines a material alteration as follows:

"Any alteration which changes (1) the date . . . or any other change or addition which alters the effect of the instrument in any effect, is a material alteration."

The argument of the appellant is no doubt sound if the alteration here made is material so as to change the date or to alter the effect of the instrument. The note upon its face shows that the makers promised to pay one year after date and recited that the note was "due October 24th, 1903." The words "October 24th, 1903," were written in ink plainly and in the same hand and at the same time the note was made. The figures "189" at the head of the note in the date line were printed. The scrivener followed these printed figures with the figure "2" in ink. The dates contradicted each other upon the face of the note. Under such conditions, the written figures control the printed ones, so that the true date of the note will be construed as 1902 and not as 1892. The alteration, therefore, did not change the date of the note nor alter the effect of the instrument and was, of course, not material. The other alleged errors are based largely upon the point just considered.

We find no merit in any of them, and the judgment must therefore be affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8491. Department Two. February 15, 1910.]

# LEWIS A. GASAWAY, *Respondent*, v. FRED A. BALLIN *et al.*, *Appellants*.[1]

TENANTS IN COMMON—TRUSTS—VENDOR AND PURCHASER. Where the holder of a title to lands agrees, by a written contract, to convey a one-half interest to another, upon payment of specified sums constituting one-half of the original purchase price, they are not tenants in common, and the title holder is not a trustee for the other, their rights being fixed by the written contract.

VENDOR AND PURCHASER—CONTRACTS—RESCISSION BY VENDOR. The holder of the legal title to lands may by notice abrogate a contract whereby he had agreed to convey a one-half interest to another on the payment of specified sums, where the other party violated the provisions of the contract requiring him, in the case of a sale of lots, to pay one-half of the money received to the title holder and to apply the other half upon an indebtedness secured by mortgage on the property.

LIMITATION OF ACTIONS—ACCRUAL—VENDOR AND PURCHASER—CONTRACT TO CONVEY. Where the rights of the parties are fixed by a written contract requiring a grantee to reconvey a one-half interest to the grantor on the payment of specified sums, the grantor's right of action on the contract accrues when the grantee gives a written notice abrogating the contract for the default of the grantor, and is barred six years thereafter.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered June 7, 1909, upon findings in favor of the plaintiff, after a trial on the merits, in an action for an accounting. Reversed.

*Gill, Hoyt & Frye* and *R. L. Blewett*, for appellants.

*S. G. Murray*, for respondent.

RUDKIN, C. J.—On or about the 23d day of August, 1901, the plaintiff, Gasaway, informed the defendant Fred A. Ballin that a deed in his favor for 68 lots in Terrell's addition to the town of Charleston, in Kitsap county, was lying in escrow in one of the Seattle banks awaiting the payment

[1]Reported in 106 Pac. 905.

of the purchase price of $750, and that he did not have the funds necessary to enable him to take up the deed. After examining the property, it was agreed between the parties that Ballin would pay $510 for an undivided one-half interest in the lots. The consideration was paid and Gasaway gave Ballin a receipt for the amount, in which the former agreed to procure title to the lots and convey an undivided one-half interest to the latter. Ballin then returned to his home in Portland, Oregon, and immediately informed Gasaway by letter that he would advance $250 additional, to make up the balance of the original purchase price if necessary, the amount advanced to be repaid from the first sales of lots. Ballin heard nothing more from Gasaway for about a month, and received no answer to his letters. He then went to Charleston and Seattle and located Gasaway after considerable difficulty, only to be informed that the latter had lost a good part of the funds advanced, through an investment in a coal option, and was unable to take up the deed, which was still in the bank. Ballin then compelled Gasaway to return to him the $200 left out of the $510 theretofore advanced, and required him to raise the sum of $550 by mortgage on the lots to pay the balance of the purchase price. Arrangements were finally made with the Robertson Mortgage Company to loan $550 on the lots, taking an assignment of certain land contracts held by Gasaway as additional security. When the parties came to close up the loan, however, $50 was held out of the loan to cover overdue payments on the land contracts, so that only $500 was realized on the mortgage. Ballin advanced the additional $250 necessary to make up the original purchase price, and $8 to pay certain bank charges. Gasaway then deeded the lots to Ballin, and the latter and his wife in turn executed a contract in favor of the former wherein it was agreed that Ballin and wife would convey an undivided one-half interest in the lots to Gasaway on the following conditions:

"First. That said party of the second part shall have

paid in full that certain mortgage made, executed and delivered this day by said party of the second part to William B. Robertson, in the sum of Five Hundred Fifty Dollars ($550).

"Second. That said party of the second part shall have paid to said parties of the first part the sum of Two Hundred Fifty Dollars ($250) now due from said party of the second part to said parties of the first part; and

"It is further agreed that said party of the second part may proceed to sell said lots, or any of them, at a price not less than Fifty Dollars ($50) each net, and that out of the proceeds of the sale of said lots said party of the first part herein shall receive one-half of the net proceeds of such sale, and said party of the second part will apply his portion of the selling price of said lots, to wit, one-half thereof, to the liquidation of the aforesaid obligations in the following order, to wit:

"First, in the payment of said mortgage of Five Hundred Fifty Dollars ($550) as fast as the proceeds are realized from such sales, and

"Secondly, in the payment of said sum of Two Hundred Fifty Dollars ($250) to said parties of the first part herein, and when said obligations are paid in full then the said parties of the first part will make, execute and deliver to said party of the second part as aforesaid, a warranty deed to an undivided one-half of the above described lots that are then unsold."

Soon after the execution of this contract, Gasaway entered into a contract for the sale of four of the lots and received $50 on account of the purchase price. He paid $10 of this sum to the Ballins, but failed and refused to pay over or account for the residue or to apply any portion of it on the mortgage indebtedness as agreed. For this failure on the part of Gasaway, the Ballins terminated the contract by written notice on November 18, 1901. Nothing whatever transpired between the parties from that date until the commencement of the present action, six and one-half years later. The Ballins in the meantime paid all taxes levied against the property and paid off the Robertson mortgage. Soon after the revocation of the contract, Gasaway induced a friend,

Kennedy by name, to take an assignment of the Robertson mortgage, and after the assignment, the personal security put up by Gasaway was released, leaving the indebtedness to stand against the property, secured only by the mortgage. There is little conflict in the testimony, but where such conflict exists we have no hesitation in adopting the testimony of the Ballins, for two reasons; first, because the court below accepted it; and second, because we deem it the more credible. From the foregoing statement it will be seen that Gasaway has not invested a cent in the property, but on the contrary is a gainer by the transaction to the amount of $400; $310 lost on the coal option, $50 of the mortgage loan applied on his personal debts, and $40 derived from the proceeds of the sale of lots.

The present action was instituted by Gasaway for an accounting and for an undivided one-half interest in the property after such accounting. The complaint proceeded upon the theory that the plaintiff and defendants were tenants in common of the lots. The court accepted this theory and gave judgment in favor of plaintiff, from which this appeal is prosecuted.

From the foregoing statement it must be apparent that the respondent and appellants are not tenants in common of the property. A court will never assume or hold that one person holds title to property in trust for another, or as security for a debt, where the rights of the parties have been agreed upon and are fixed by a definite specific written contract. *Dignan v. Moore*, 8 Wash. 312, 36 Pac. 146; *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941; *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61; *Conner v. Clapp*, 37 Wash. 299, 79 Pac. 929; *Dabney v. Smith*, 38 Wash. 40, 80 Pac. 199.

Whatever right or interest the respondent had or acquired in the lots in controversy arose out of the written contract above set forth. That contract was abrogated by the appellants in November, 1901, for good and sufficient cause, and a right of action accrued in favor of the respondent at that

time, if a right of action he ever had. He did not attempt to enforce his rights then, because he had already realized $400 out of the transaction, and could hope for nothing further unless the property should bring at least $50 more than the original contract price. But now the situation has changed; the property has increased in value three or four fold; and after the lapse of nearly seven years, he asks the aid of a court of equity to enable him to reap where others have sown. To grant such relief at this late day, under the circumstances disclosed by this record, would be inequitable in the extreme. The right of action in favor of the respondent, if any such ever existed, was upon a written contract, and accrued more than six years prior to the commencement of this action. The cause of action is therefore barred by the statute of limitations, but if it were not, a court of equity would find little difficulty in disposing of the case adversely to the respondent on other equitable principles.

The judgment is reversed with directions to dismiss the action.

MOUNT, PARKER, DUNBAR, and CROW, JJ., concur.

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[No. 8285. Department Two. February 15, 1910.]

*In the Matter of the Estate of* MONS J. OSTLUND, *Deceased.* SWAN P. PALMQUIST, *as Administrator etc., Appellant*, v. S. E. SAGSTAD, *Respondent.*[1]

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—ORDER—EFFECT—WILLS—DESCENT AND DISTRIBUTION. Upon the probate of a will in favor of a husband, which was void as to the testator's children because they were not named or provided for in the will, a decree of final distribution awarding all the property to the husband, upon published notice as required by statute, is conclusive and binding upon the children, if unquestioned and unappealed from, notwithstanding Rem. & Bal. Code, § 1366, providing that upon the death of a person seized of lands, the title thereto shall vest immediately in his heirs or devisees.

[1]Reported in 106 Pac. 1116.

SAME—NOTICE OF APPLICATION FOR DISTRIBUTION. Under Rem. & Bal. Code, §§ 1499, 1500, and 1589, personal notice to the heirs is not necessary to confer jurisdiction upon the court to enter a final order of distribution which is binding and conclusive on them, although erroneous.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 10, 1909, upon findings in favor of the defendant, in probate, determining the validity of an executor's sale. Reversed.

*L. H. Wheeler*, for appellant.

*J. P. Wall*, for respondent.

PARKER, J.—The appellant seeks to enforce payment of the balance of the purchase price due from the respondent upon a sale of real property made in pursuance of an order of sale entered by the superior court. The issues involved were presented to the court in a somewhat informal manner, in the probate proceeding. The controversy was, however, submitted by both parties upon the merits. The disposition of the matter by the trial court was based upon findings of fact and conclusions of law, which disclose the issues involved and decided. The facts as found, so far as necessary for us to notice, are in substance as follows: Prior to May 6, 1903, Mons J. Ostlund and Elsie Ostlund were husband and wife, residing in King county, and were the owners of lots 4 and 5, block 32, in Gilman Park, King county, as their community property. On May 6, 1903, Elsie Ostlund died, leaving a will by which she devised all of her property to her husband. She left surviving her several children, all of whom were then over twenty years old, and none of whom were named or provided for in the will. On March 9, 1905, the will was duly admitted to probate in the superior court for King county, and Mons J. Ostlund was appointed and qualified as executor thereof. On June 5, 1906, upon the executor's filing his account and petition for distribution, and upon due notice by publication, as the law requires, a decree of final settlement and distribu-

tion was duly made and entered in the matter of the estate of Elsie Ostlund, whereby it was,

"Ordered, adjudged and decreed that the account be approved and settled, and that all of the property of said estate above described be and the same is hereby distributed to said Mons J. Ostlund as his sole and separate property, and that the said estate be and hereby is closed and settled;"

the lots here involved being described in the decree.

On August 24, 1907, Mons J. Ostlund died in King county, leaving a will, and thereupon Swan P. Palmquist was, by the superior court for King county, duly appointed and qualified as administrator of the will annexed of the estate of Mons J. Ostlund. On January 25, 1909, an order was duly made and entered by the superior court, directing the administrator to sell at private sale, for the purpose of paying the debts of the deceased and the expenses of administration, these lots, assuming they were a part of the estate of Mons J. Ostlund. Thereafter the administrator offered the lots for sale by giving due notice thereof, when the respondent in writing duly bid therefor at said administrator's sale the sum of $2,350, and paid as earnest money thereon the sum of $235. This was the highest and best bid, and was accepted by the administrator subject to confirmation by the court. Thereafter on March 11, 1909, the court made an order confirming the sale and directing the administrator to execute and deliver to the respondent a deed for the property upon payment of the balance of the purchase price. Thereafter the administrator tendered to respondent a deed for the lots and demanded payment of the balance of the purchase price which was refused. In addition to these facts the court found the following:

"That the said administrator of the said estate of Mons J. Ostlund, deceased, at the time of receiving the bid of said S. E. Sagstad for said lots, promised to furnish said S. E. Sagstad an abstract showing fee simple title to said property and that upon confirmation of said sale said administrator

would convey to the said S. E. Sagstad an absolute fee simple title to all of said lots, clear of encumbrances.

"That an abstract was not furnished until after the confirmation of said sale and that said abstract disclosed that the only interest or title which the said deceased Mons J. Ostlund, had or could have in and to the undivided half owned by his wife, Elsie Ostlund, deceased, was under and by virtue of decree of distribution under the will of said Elsie Ostlund, deceased, and that the children of said Elsie Ostlund were never cited or served with process or given any notice of decree of distribution made under said will save and except the notices required by the statute in cases of publication."

From these facts the court concluded, "that the said estate of Mons J. Ostlund does not own more than one-half of said lots, that the administrator of said estate is unable to convey said lots according to his contract to the said S. E. Sagstad and that S. E. Sagstad is entitled to have returned to him his deposit on said sale, to wit: the sum of two hundred thirty-five ($235) dollars;" and rendered judgment as follows:

"Now, therefore, it is ordered, adjudged and decreed that said S. E. Sagstad be not required to pay the balance of said purchase price and that the said administrator of said estate be and hereby is ordered and directed to pay to the said S. E. Sagstad the sum of two hundred thirty-five ($235) dollars out of any moneys now in his hands or under his control and that the said S. E. Sagstad be and hereby is given judgment against Swan P. Palmquist, administrator of the estate of Mons J. Ostlund, deceased, for the sum of two hundred thirty-five ($235) dollars;"

from which the administrator has appealed.

It is plain that the learned trial court rested its decision upon the assumption; (1) that by reasons of the representations made to the respondent by the administrator at the time of receiving the bid, the respondent was not required to consummate the purchase if the title of the deceased to the lots should appear defective upon the furnishing of the abstract; and (2) that such title did prove defective, because it rests upon the decree of distribution in the estate of Elsie Ostlund, the deceased wife of Mons J. Ostlund; that such de-

cree is not conclusive against the children of Elsie Ostlund, deceased; that her will was void as to them; and hence her husband Mons J. Ostlund became the owner of only a one-half interest in the lots. These are apparently the only questions presented to or decided by the learned trial court, and are the only questions affecting the merits discussed by the respective counsel in their briefs and arguments upon this appeal.

As against respondent's contention that he has a right to the return of the earnest money because of the alleged defective title, the doctrine of caveat emptor is invoked by appellant. It becomes unnecessary, however, for us to express any opinion upon this contention, in view of our conclusion upon the question of the title of Mons J. Ostlund, deceased, under the decree of distribution rendered in the matter of his deceased wife's estate. It is not contended that there was any irregularities or want of published statutory notice as a basis of the jurisdiction of the court in rendering that decree; but it is contended by counsel for respondent, and so held by the learned trial court, in effect, that since Elsie Ostlund did not name or provide for her children in her will it was void as to them, and that they took by inheritance a one-half interest in these lots while her husband took only the other half; and that the decree was not final as to them.

In support of the contention as to the will being void, we are cited to Rem. & Bal. Code, § 1326; *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598; *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779; and *Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530. The law announced by these authorities is well settled in this state, as contended for by counsel for respondent, but they are applicable only to the question which was before the superior court in the matter of the estate of Elsie Ostlund upon the hearing of the matter of distribution therein, when the decree was rendered distributing all the property of that estate to Mons J. Ostlund. It is not contended that that decree has ever been reversed or modified, and of course it is

apparent that the time for appeal therefrom has long since past; neither is its effect sought to be avoided upon the ground of fraud. The contention that the court, in rendering the decree, erroneously determined who was entitled to the property as distributee upon distribution of the estate of Elsie Ostlund, goes only to the merits of the question then before the court, and is wholly foreign to the question of the jurisdiction of the court to determine who was entitled to the property then being distributed.

Counsel for respondent calls our attention to § 1366 of Rem. & Bal. Code, which provides:

"When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws;"

and, also, the case of *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765, where it was held, under this section, that a formal decree of distribution was not necessary to vest title in the heirs or devisees of the deceased, and wherein the court said: "As such a decree however neither creates their title nor their right of possession to the property a distribution made without it cannot be invalid." This language was used in discussing the validity of a voluntary distribution of the property by the heirs among themselves. The argument of learned counsel seems to be that, since the decree of distribution does not create the title in the distributees, therefore, it can have no effect as an adjudication, if perchance, the court should therein erroneously determine who the distributees are. It is true the decree does not create the title in the distributees, but it is a solemn adjudication of who acquired the title of the deceased, and if rendered upon due process of law is final and conclusive upon that question. Its very object and purpose is to judicially determine who takes the property left by the deceased. The only question here to determine is, was that decree a final determination of the

rights of Mons J. Ostlund in and to these lots, binding upon all persons making claim thereto as heirs of Elsie Ostlund.

The suggestion arises upon the findings above quoted that the want of personal notice given to the children of Elsie Ostlund rendered the decree of distribution of no binding force as against them. Counsel for respondent does not seem to rest his contention upon this point, but upon the alleged invalidity of the will and the statute vesting title in the heirs immediately upon the death of the ancestor. However a sufficient answer to any contention which might be made upon the want of personal notice is the fact that our statute does not require any such notice, but gives the court jurisdiction of the matter of distribution upon the publication of an order to show cause "directing all persons interested to appear . . ." Rem. & Bal. Code, §§ 1499, 1500, 1589.

The supreme court of California in discussing the force and effect of a decree of distribution made upon a published notice only, under a procedure similar to ours, in the case of *Cunha v. Hughes*, 122 Cal. 111, 112, 54 Pac. 535, 68 Am. St. 27, said:

"Upon an application for the distribution of an estate, the entire world is notified to be present at the hearing, and to make known their claims, if any they have, to the estate of the decedent or any portion thereof, and the decree of distribution becomes a judicial determination of their claim, which, unless reversed, set aside, or modified upon appeal, is conclusive of their rights, the same as is a final judgment in any other action or proceeding. By giving the notice in the manner prescribed by the statute, the court acquires jurisdiction over all persons entitled to assert any claim to the estate, and, whether they appear and present their claim for adjudication, or fail to appear and suffer default, the judgment is conclusive upon them. The decree of distribution becomes the measure of the rights of all claimants to the estate, and their rights are to be determined by the terms of this decree."

In the case of *Chadbourne v. Hartz*, 93 Minn. 233, 101 N. W. 68, it is said: "A decree by a probate court having

jurisdiction, assigning the residue of the estate of a deceased person, is conclusive upon all persons interested in such estate. Such decree is in the nature of a judgment in rem, which binds all the world." 1 Freeman, Judgments, p. 581; 18 Cyc. 663; 2 Woerner's American Law of Administration, 561.

Judge Woerner says: "When the statutory provisions are complied with, the distribution is said to partake of the nature of a proceeding in rem, and is conclusive upon all persons having any interest in the estate." We are of the opinion that the title of Mons J. Ostlund to these lots at the time of his death was not defective because resting upon this decree of distribution. The decree was a final adjudication by a court of competent jurisdiction, upon due process of law, as to his right and title thereto. The following decisions of this court, though not involving the exact question here presented, lend support to and are in harmony with this view. *Ryan v. Fergusson*, 3 Wash. 356, 28 Pac. 910; *Webster v. Seattle Trust Co.*, 7 Wash. 642, 33 Pac. 970, 35 Pac. 1082; *Prefontaine v. McMicken*, 16 Wash. 16, 47 Pac. 231; *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502; *Meeker v. Winyer*, 48 Wash. 27, 92 Pac. 883.

We conclude that the superior court was in error in rendering the judgment it did against the administrator, and declining to render judgment against the respondent. The judgment is therefore reversed, with directions to enter judgment against the respondent.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8240. Department One. February 16, 1910.]

# S. A. Keenan *et al.*, *Respondents*, v. Lauritzen Malt Company, *Appellant*.[1]

Principal and Agent—Authority—Employment of Attorneys—Evidence—Sufficiency. A person prosecuted for maintaining a place in which intoxicating liquors were kept for unlawful sale and for selling the same without a license, was a general distributing agent of a foreign corporation which owned the goods, and was acting within the scope of his general authority in employing an attorney to defend him and to resist seizure and sale of the goods, valued at several thousand dollars, where it appears that the agent so represented to the attorneys and showed them correspondence between himself and the company bearing out his statements, that the right to sell the goods had been similarly litigated in other states, that the agent kept the company fully advised as to the prosecutions, wrote for instructions, and made a payment on the account by draft on the company, which acquiesced in and ratified the employment.

Evidence — Secondary Evidence — Notice to Produce Letter—Time. It is not error to admit evidence of the contents of a letter, demanded only twelve days before the trial, on the theory that the time was not sufficient for procuring and forwarding the letter from Minneapolis; as the time appears ample, in the absence of proper showing to the contrary.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 10, 1909, upon findings in favor of the plaintiffs, in an action on contract, after a trial before the court without a jury. Affirmed.

*A. C. & R. W. Emmons* and *Fred Wayne Catlett*, for appellant.

*H. A. P. Myers*, for respondents.

Gose, J.—This action was brought by the respondents, suing as copartners, against the appellant, to recover compensation for professional services as attorneys at law. The controlling question in the case is whether one Childs had

[1]Reported in 106 Pac. 1122.

authority to employ counsel in the name of, and at the expense of, the appellant. The trial court found that the respondents rendered services for the appellant at its instance and request, and entered judgment against it for the reasonable value of the services. This finding necessarily implied that Childs had such authority. It is conceded that he is the party who actually employed the respondents.

The evidence is undisputed that the appellant is a foreign corporation, having its head office at Minneapolis, in the state of Minnesota; that it manufactures for wholesale a certain drink, which it claims is nonintoxicating and can be sold without a local license; that Childs came to Tacoma for the purpose of introducing and selling this product in the state of Washington, and other Pacific Coast states; that, in at least three other states, the appellant was required to litigate in the courts the question of the nonintoxicating quality of its goods; that Childs commenced selling the goods at Tacoma; that he was twice arrested, tried, and acquitted; that the respondents were his sole attorneys in both cases in the superior court; that in the first action he was prosecuted for conducting a public nuisance, and goods worth several thousand dollars were seized for destruction in case of his conviction, and that he was prosecuted a second time for selling intoxicating liquors without a license. The evidence is convincing that, before employing the respondents, Childs stated to them that he was the representative of the appellant for the sale of its goods on the Pacific Coast, including Alaska and the Oriental trade; that the appellant's goods, to the extent of $12,000, had been seized; that the appellant had directed him to employ counsel; that he employed them to represent the appellant, and that, relying upon his representations and certain letters shown them at the time of the employment, respondents appeared and conducted the cases to a successful termination. Later the respondents rendered a bill for their services to the appellant.

Childs was charged in the first case in the justice court

with maintaining a place in which intoxicating liquors were kept for unlawful use and sale, which is a nuisance under Rem. & Bal. Code, §§ 6277-6281. This statute directs that, when a complaint is made charging a violation of its provisions, a search warrant shall be issued and the goods shall be seized and kept in the custody of the officer, to be destroyed by him if the defendant is found guilty. Childs was found guilty in the justice court where he was represented by other counsel, and was acquitted on an appeal upon a trial in the superior court. The appellant was advised of the prosecution in justice court by the attorney then representing Childs, by a letter which set forth the statute in full and which stated that it was written at the instance of Childs "its agent." The appellant answered this letter at length, cited authorities which it deemed applicable, and closed by expressing a hope that a favorable decision would soon be obtained. Copies of these letters were shown to respondents by Childs when negotiating for their employment. We think the evidence shows that the goods were shipped to Childs as a general distributing agent of the appellant, and that the latter paid the freight and storage charges. It is apparent that the appellant was the real party in interest in both cases. Not only was its business in this state dependent upon the final determination of the cases, but its goods to the extent of several thousand dollars in value would have been destroyed if a conviction had been obtained in the superior court in the first case. Childs kept them advised by letters and telegrams of the progress and result of the cases. The appellant not only knew that the respondents were employed, but it knew that the goods were seized for destruction. Its claim that the goods seized were the property of Childs is not supported by the evidence.

We have adverted to the fact that the respondents rendered a bill for their services to the appellant. The trial of the case at bar began on February 3, 1909. On January 22 preced-

ing, the respondents made a written demand upon the appellant to produce the original letters or copies thereof passing between it and Childs. One of the respondents was permitted to testify that, after their statement of account had been submitted to the appellant, Childs showed him a letter, not in the record, which he had received from it, which stated that it had received a second letter from the respondents, that their charge was exorbitant, and directing Childs to call upon respondents and adjust their claim. On March 28, 1908, the day after the conclusion of the last of the two trials, Childs wrote the appellant that the prosecuting attorney was threatening to run "us out of the state," and stating, "Better instruct me what to do if there is another warrant sworn out." We find no answer to this letter in the record, although the appellant was requested to attach copies of all its letters to Childs to the deposition of its general manager. It is incredible that it would have failed to reply to a letter so vitally affecting its business.

The appellant claims that the goods were sold and delivered to Childs, f. o. b. the cars at Minneapolis, but it fails to produce a copy of any letter advising him of a shipment or containing a statement of account against him. It appears from the correspondence between the appellant and Childs that the latter was threatened with and expecting arrest some weeks before the arrest occurred. It is unreasonable to assume that Childs would have undertaken at his own expense to litigate the right to sell appellant's goods in the state without a license. The fact that the right to sell the goods as a nonintoxicating drink, without a license, in other states had to be established by litigation, induces the belief that both parties expected the same difficulty to confront them in this state, and that it was contemplated that the appellant should bear the burden of the litigation. This view is strengthened by the further fact that the attorney who appeared in justice court was paid by a draft drawn by Childs on the appellant.

A careful examination of the record convinces us that Childs was the general agent for the appellant on the Pacific Coast, for the purpose of introducing and distributing its goods and establishing local agencies; and that, as such, the employment of the respondents was, upon all the facts, within the scope of his agency. Moreover, the appellant knew that the respondents had been employed in its behalf, and acquiesced in and ratified the employment. It is true the evidence is conflicting upon the question of agency, but considered in the light of all the attending circumstances, the inference we have made is both the just and the logical one. Counsel for the appellant state the familiar rule that the declarations of an agent as to his agency are not admissible to establish that fact. His declarations as to the capacity in which he was acting are, however, as we have seen, supported by competent testimony, both direct and circumstantial. It is argued that the witness should not have been permitted to testify as to the contents of the appellant's letter, in view of the fact that only twelve days had intervened between the demand for the production of the letter and the trial. The time would seem ample to procure the forwarding of a letter from Minneapolis. However, no proper showing was made as to the insufficiency of the time, nor was further time asked in which to produce the letter. The court properly admitted evidence as to its contents.

The view we have taken of the case makes the authorities cited by the appellant inapplicable. It is elementary that contracts are enforcible against the principal when made by the agent acting within the scope of his powers, and it is equally fundamental that the subsequent ratification of an act where the facts are known is equivalent to a previous authorization.

The judgment will be affirmed.

Rudkin, C. J., Chadwick, Fullerton, and Morris, JJ., concur.

[No. 8433. Department One. February 16, 1910.]

OREGON & WASHINGTON RAILROAD COMPANY, *Respondent*, v. VULCAN IRON WORKS, *Appellant*.[1]

LANDLORD AND TENANT—UNLAWFUL DETAINER—WHEN LIES—DEEDS—ORAL RESERVATIONS—EVIDENCE—ADMISSIBILITY. Where premises are conveyed by deed absolute in form, the grantor remaining in possession under an oral agreement to pay a monthly rental, the conventional relation of landlord and tenant exists, making the summary proceeding by unlawful detainer available, and it is incompetent for the grantor to show by parol a reservation or limitation whereby it was orally agreed that the grantor was to retain an interest and possession for the period of one year upon making the monthly payments.

SAME—TENANCY FROM MONTH TO MONTH—TERMINATION. Such a holding is a tenancy from month to month, under Rem. & Bal. Code, § 8803, and may be terminated at the end of any month by giving the statutory notice.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 21, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action of unlawful detainer. Affirmed.

*Hughes, McMicken, Dovell & Ramsey*, for appellant.
*Bogle & Spooner* and *Howard M. Findley*, for respondent.

RUDKIN, C. J.—On the 8th of February, 1906, the defendant conveyed the real property now in controversy to one Mary L. Struve by warranty deed; on the same day Mary L. Struve conveyed by warranty deed to the Washington Northern Railway Company; and on the 24th day of July, 1906, the Washington Northern Railway Company conveyed to the plaintiff, the Oregon and Washington Railroad Company. The present action was instituted by the latter company under the unlawful detainer statute to recover posses-

[1]Reported in 106 Pac. 1120.

sion of the demanded premises. The fourth allegation of its complaint was as follows:

"That prior to January 1, 1908, the defendant was in the lawful possession of the above described property; and that on or about January 1, 1908, it was orally agreed between plaintiff and defendant that said defendant should continue in the use and occupation of the above described property from month to month as the tenant of this plaintiff, and should pay to this plaintiff, as rental for said premises, the sum of Six Hundred Dollars ($600) per month, payable on the first day of each month in advance; that under said oral agreement, and not otherwise, the said defendant continued in the possession of said premises as tenant of this plaintiff, and paid plaintiff the said agreed rental for the said month of January, 1908, and for each succeeding month, up to and including the month of February, 1909; and that said defendant has ever since continued and still remains in the possession of said premises."

The answer of the defendant denied the foregoing allegation in these words:

"Answering paragraph IV of said complaint, defendant admits that it was prior to January 1, 1908, in the lawful possession of the premises described in plaintiff's complaint, and admits that it was at and prior thereto agreed between plaintiff and defendant that defendant should continue in the use and occupation of said premises, and should pay plaintiff therefor the sum of six hundred dollars per month, and that defendant has ever since continued in the possession of said premises, and has ever since paid and tendered to plaintiff the said sum of six hundred dollars per month, and has even since continued and still remains in the possession of said premises; but defendant denies each and every of the remaining allegations of said paragraph IV."

In addition to the denials, the answer contained an affirmative defense, alleging in substance, that, at and prior to the date of the conveyance from the defendant to Mary L. Struve, the defendant was engaged in maintaining and operating, on the granted premises, a foundry, machine shops, moulding works, and blacksmith shops; that, in the conduct

of its business, it owned and kept on the premises large quantities of iron, steel, copper, lead, and other materials and supplies, used in manufacturing and repairing machinery, tools, and implements, as well as materials and supplies for sale to its customers; that, at the time of the conveyance to Mary L. Struve, the purchase was made through one F. K. Struve, who in truth and in fact represented the plaintiff in this action; that the scope, nature and extent of the defendant's business was fully explained and made known to said Struve, and as a part of the consideration for such sale and conveyance it was agreed that the defendant should reserve and retain possession of the premises, for the purpose of conducting and carrying on its business thereon, for the period of one year from March 1st, 1906, and thereafter until the expiration of one year from and after the giving of written notice by the grantee requiring the surrender and delivery of possession, and that the defendant should pay the sum of $600 per month for the use and occupation of the premises; that, after the plaintiff took the title to the premises in its own name, it acquiesced in the agreement theretofore made with the said Struve, and promised and agreed that it would give six months written notice before demanding possession, such promise and agreement being so made to enable the defendant to provide and prepare suitable premises for the conduct of its business elsewhere; that, relying upon such agreement and promises, the defendant has continued in the possession and occupation of the premises, has made permanent and additional improvements and repairs, installed new and additional machinery, and has erected foundations for other necessary structures, at a cost of $10,000; that the defendant now has on the premises more than 30,000 tons of machinery, tools, etc. of the value of $900,000, has outstanding contracts which it will require six months to fill and perform, etc. The court refused to admit oral evidence in support of the affirmative

defense, and the trial resulted in a verdict and judgment for the plaintiff, from which this appeal is prosecuted.

The appellant contends in support of its appeal that the special statutory proceeding by unlawful detainer will not lie in this case, because the conventional relation of landlord and tenant does not exist between the appellant and the respondent, and this is the sole question presented for our consideration. The contention of the appellant that it reserved an estate or interest in the land at the time of the original conveyance to its immediate grantee cannot be sustained. Its deed is absolute in form and any attempt to engraft reservations or limitations upon the estate granted would contravene well settled rules of evidence. *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 Pac. 955; *Morris v. Healy Lumber Co.*, 46 Wash. 686, 91 Pac. 186; *Hawver v. Wright*, 21 Misc. Rep. 211, 45 N. Y. Supp. 659; 17 Cyc. 619 *et seq.*

Under the facts which the parties were permitted to prove, the situation is this: the respondent is the absolute and unqualified owner of the premises in controversy, and the appellant is in possession under an agreement to pay $600 per month rent for use and occupation, with no written lease or contract creating or establishing an estate or interest in the land. Such a holding the law declares to be a tenancy from month to month (Rem. & Bal. Code, § 8803); and the tenancy may be terminated by the requisite statutory notice before the end of any month. *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852. A grantor who reserves an estate in the granted premises does not become a tenant of the grantee, but no estate was here reserved. We have the unqualified ownership in one person, the possession in another, and an agreement on the part of the person in possession to pay a stipulated sum per month for use and occupation. All the essential elements of a tenancy would seem to exist, unless we sacrifice substance to mere form; and while only a landlord may avail himself of the summary proceeding by unlaw-

ful detainer, the relation of landlord and tenant may exist or be created without an express contract. Jones, Landlord and Tenant, §§ 1, 5; Taylor, Landlord and Tenant, § 26; *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682.

We hold, therefore, that the original relationship between the appellant and the respondent was that of landlord and tenant by construction of law; that that relationship could be terminated by thirty days written notice before the expiration of any rental period, and that, if the appellant acquired any further or greater interest in the premises by part performance of an oral contract, such a defense is not permissible in this form of action.

The judgment of the court below is therefore affirmed.

CHADWICK, GOSE, FULLERTON, and MORRIS, JJ., concur.

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[No. 8449. Department Two. February 17, 1910.]

JOHN LIVIERATOS, *Respondent*, v. COMMONWEALTH SECURITY COMPANY, *Appellant*.[1]

CORPORATIONS—OFFICERS AND AGENTS—AUTHORITY TO CONTRACT—VENDOR AND PURCHASER. A sales agent for a corporation has apparent authority to enter into a contract, and may therefore bind the company to refund all purchase money paid after payment of six monthly installments, if the purchaser is then dissatisfied, where it appears that the agent had general authority to make sales, and that the officers and agents met at frequent intervals to discuss the affairs of the company, on which occasions the president authorized the sales agents to make such a contract with purchasers; since the sales agents had a right to assume that the corporation was speaking through its president, unless the contrary appears.

VENDOR AND PURCHASER—CONTRACTS—"PROMPT" PAYMENT—REMEDIES OF PURCHASER—REFUNDING PRICE. Where a contract for the sale of lots requiring payment in monthly installments provided for forfeiture in case of default for more than sixty days, payments made within the sixty-day limit are "promptly" made, within the

[1]Reported in 106 Pac. 1125.

meaning of an agreement to refund the first six installments if the purchaser is then dissatisfied and the same have been "promptly paid."

TENDER—NECESSITY—WAIVER. A tender is not necessary where it conclusively appears that it would not have been accepted if made.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 12, 1909, upon findings in favor of the plaintiff, in an action on contract, after a trial before the court without a jury. Modified.

*Douglas, Lane & Douglas*, for appellant.

*Freudenberg & Heaton*, for respondent.

RUDKIN, C. J.—The Narrows Land Company, a corporation, is the owner of a large tract of land in Pierce county, platted as Regents Park. A realty company known as Bowes-Irwin Company was formed or incorporated for the purpose of selling the lots contained in this plat. The defendant, Commonwealth Security Company, a corporation, was employed by the Bowes-Irwin Company as sales agent for the city of Seattle and vicinity. One W. H. B. Thomas was a sales agent for the defendant company, and was also connected in some way with the Bowes-Irwin Company. On the 18th day of November, 1907, the plaintiff made a deposit of $20 on the purchase price of two lots in the above tract, and received a receipt therefor, with the following endorsement on the back, signed by Thomas as manager: "'Agreement to return amount paid after six monthly installments to be given to purchaser on execution of contract of sale." On November 20, 1907, Thomas delivered to the purchaser the following agreement, written on one of the letter heads of the defendant company:

"I hereby agree at the option of John Livieratos, to refund to the said John Livieratos, after six monthly installments have been paid upon lots 24 and 25, Block 1, Regents Park, Pierce county, Washington, (provided said installments have been promptly paid as the same fall due) the

amount paid by the said John Livieratos on said lots after the said six monthly installments have been paid; the said John Livieratos to transfer all his right, title and interest in and to said lots on payment to him of said sum, and to accept said sum without interest; hereby waiving all profits which might accrue on said lots in the event he exercises the option aforesaid.

"W. H. B. Thomas, Sales Mgr. Regents Park."

On December 19, 1907, a formal contract of sale was entered into between the Narrows Land Company and the plaintiff for the two lots. By the terms of this contract the purchase price of $2,650 was payable as follows: $265 on execution of the contract, and $35 on or before the 19th day of each and every month thereafter, until the full payment of the purchase price, with a declaration of forfeiture in case the purchaser continued in default for more than sixty days after any installment became due. The initial payment of $265 was made as follows: November 18, 1907, $20; November 21, 1907, $112.50; January 4, 1908, $70; January 21, 1908, $62.50. The monthly installment due January 19, 1908, was paid March 19, 1908; the installment due February 19, 1908, was paid April 18, 1908; the installments due March 19, 1908, and April 19, 1908, were paid May 18, 1908, and the installment due May 19, 1908, was paid May 29, 1908. The present action was instituted to recover the amount of these several payments, the complaint alleging the execution of the foregoing contracts, the payment of five monthly installments according to their terms, a tender of the sixth monthly installment in due time, a demand for the return of the several sums paid, and a refusal on the part of the defendant to comply therewith. The material allegations of the complaint were put in issue by the answer, and the cause was tried before the court without a jury. The court found the facts substantially as alleged in the complaint, and gave judgment for the plaintiff. From that judgment, the defendant has appealed.

In support of the appeal it is contended, first, that the

proof fails to show that the appellant authorized the execution of the Thomas agreement for the return of the installments paid; second, that the respondent did not make his payments promptly as required by the terms of the agreement, and third, that the respondent did not make a demand for the repayment of the money within the time limited by the contract, and did not tender to the appellant a transfer or assignment of his contract or interest in the lots.

(1) The witness Thomas, who executed the agreement upon which the respondent relies, testified that he represented the appellant in the sale of the lots to the respondent; that he executed the agreement in its behalf, and was authorized so to do by the president of the appellant company, and that the company had full knowledge of the execution of the agreement within a day or two after its execution. True, the witness testified further that some time after the execution of the instrument a doubt arose in his mind whether his authority came from the president as an individual or as a representative of the corporation, but his doubts were not justified by the facts out of which they arose. The witness testified that the officers and agents of the appellant company met at frequent intervals to discuss the affairs of the company, and on such occasions the president authorized sales agents to inform purchasers of lots in Regents Park that if they became dissatisfied with their purchases at the end of six months the lots would be taken off their hands, and their money refunded, but whether this was to be done by the company, or by the president individually he could not recall. Certainly if the affairs of the company were under discussion when such instructions were given, those to whom they were given had a right to assume that the corporation was speaking through its president, unless the contrary appeared, and to govern themselves accordingly. In this day and age when so large a part of the business of the commercial world is transacted through the agency of corporations, those dealing with them cannot be expected to prove the authority

of corporate agents by producing a power of attorney under the corporate seal. They have a right to rely upon the apparent authority of those with whom they deal, and for acts done within the scope of that authority the corporation is bound. As said by this court in *Rowland v. Carroll Loan & Inv. Co.*, 44 Wash. 413, 87 Pac. 482:

"It is not in harmony with any sound code of ethics, and is not the policy of the law, to permit a solvent corporation to obtain and appropriate the property of another on the credit of its solvency, and then escape responsibility by hiding behind some impecunious officer of such company."

(2) On the second question presented we are of opinion that the court was fully warranted in finding or concluding that payments made within the sixty days allowed by the contract of sale were promptly made within the agreement to refund. The two contracts related to the same subject-matter, were a part of the same transaction, and if the purchaser was not in default under the one he was not in default under the other. The appellant accepted the respondent's money without objection and the objection now interposed to its return does not strongly appeal to us.

(3) There was a direct conflict in the testimony as to the date when the last installment was tendered, but upon that question, as well as upon all other controverted questions of fact, we are in full accord with the findings of the court below. The fact that the respondent failed to tender a transfer or assignment of his contract or interest in the lots is no defense under the circumstances disclosed by this record, but is nevertheless entitled to consideration in the rendition of the final judgment. The record shows conclusively that a tender, if made, would not be accepted, and the law does not require one to do a vain or useless thing. However, the respondent is not entitled to both the money and the contract. If the respondent is entitled to a return of his money, so the appellant is entitled to the contract, for such was the agreement of the parties.

The judgment to this extent must be modified by requiring the respondent to file a properly executed assignment of the contract with the clerk of the superior court, within thirty days after the remittitur is filed there and before any execution is issued on the judgment. If he fails in this, the court below will vacate its judgment and dismiss the action. This particular question was not called to the attention of the court below, except as an absolute defense to the action, and for this reason no costs will be allowed to either party in this court.

PARKER, DUNBAR, CROW, and MOUNT, JJ., concur.

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[No. 8554. Department Two. February 17, 1910.]

*In the Matter of the Petition of the* COMMERCIAL BANK OF SNOHOMISH COUNTY.

SNOHOMISH IRON WORKS *et al.*, *Plaintiffs*, v. GUHR LUMBER COMPANY, *Defendant*.[1]

APPEAL—REVIEW—FINDINGS—EXCEPTIONS. Findings of a referee which are not excepted to import verity.

CHATTEL MORTGAGES—SALE OF PROPERTY—PRIORITIES. Where an understanding that a corporation was to purchase and pay for certain personal property, delivered to and used by it, was not carried out or completed until after the other party thereto had given a chattel mortgage thereon, there was at most but an executory contract of sale when the mortgage was given, and the completed sale was subject to the mortgage.

Appeal from a judgment of the superior court for Snohomish county, Still, J., entered October 23, 1909, upon findings of a referee, in proceedings in a receivership to determine priority of a chattel mortgage. Reversed.

*Padgett & Bell*, for appellant.

*M. J. McGuinness* and *Robert McMurchie*, for respondent.

[1]Reported in 106 Pac. 1124.

RUDKIN, C. J.—On the 31st day of July, 1908, a receiver was appointed for the property of the Guhr Lumber Company, an insolvent corporation, by the superior court of Snohomish county, at the suit of the Snohomish Iron Works and others. The receiver qualified and took into his possession all property of the corporation, including certain teams and a logging outfit which had previously belonged to one Otto Olson. On the 28th day of March, 1908, Olson mortgaged the teams and logging outfit in question to the Commercial Bank of Snohomish county, and also to one McKeough, a former partner, to secure certain promissory notes. A controversy arose between the holders of the mortgages and the receiver as to the validity of the mortgage liens, and the present proceedings were instituted by the former to have their claims adjudged a prior lien on the mortgaged property, or the proceeds of its sale, in the hands of the receiver. The sole question at issue between the parties was the ownership of the mortgaged property at the time of the execution of the mortgages; and by consent of all parties concerned, the case was referred to a referee to take testimony upon that issue, and to report the testimony, together with his findings of fact thereon, to the court. The referee reported the following findings, to which no exceptions were taken:

"That Otto Olson purchased two thousand dollars in stock of defendant and became one of the active managing officers, in March, 1907; that at that time he was in possession of the logging outfit covered by the mortgage; that a portion of the outfit, a span of horses and some of the tools and logging implements, was property that had belonged to the firm of McKeough & Olson, which dissolved in late 1905, or early in 1906; that at the time said firm dissolved this property was left in possession of Olson, all the other assets of the firm being equally divided between the two members of the firm; that Olson continued in possession of same, using it as his own, without interference or claim of interest from McKeough; that the span of horses had been purchased by McKeough with his own funds during the time he and Olson

were in partnership; that at the time Olson purchased stock in defendant corporation and became active in its management, he placed the logging outfit in possession of defendant and it so continued in the possession of defendant and was used by it up until the receiver was appointed; that there was a mutual understanding between Otto Olson and the other officers of the defendant that defendant would purchase the outfit, and that it was to pay for same either in cash or in stock of the company, to pay cash if the company was financially able to do so; that the understanding that the company was to purchase the outfit was not fully carried out and completed until subsequent to the execution of the mortgage to the Commercial Bank and to McKeough, to wit: in April, 1907, when stock certificates were issued to Olson in payment for the outfit; that Olson was credited on the books of the company with the agreed value of the outfit in November, 1907, but that credit was entered by the bookkeeper without Olson's knowledge; that the money for which the mortgage was executed to the Commercial Bank of Snohomish was borrowed for and used by the defendant, and the same officers and stockholders with whom Olson had the understanding that the defendant would purchase the outfit represented to the bank that Olson was the owner of the property at the time the mortgage was given and the money borrowed."

Inasmuch as the findings of the referee were not excepted to, they import verity under the rule so often announced by this court. In determining whether title to personal property has or has not passed under a contract of sale, the primary consideration is one of intention. In this case the referee found, in substance, that there was an understanding between Olson and the lumber company that the company would purchase the property and pay for it in cash or in stock of the company, but that such understanding was not fully carried out or completed until after the execution of the mortgages. This finding shows clearly that there was at most but an executory contract of sale at the time the mortgages were given. The completed sale was, therefore, subject to the mortgages and the rights of the mortgagees are para-

mount and superior to the rights of the lumber company and its receiver.

The judgment will be reversed, with directions to enter a judgment establishing the mortgage liens, and for such other orders as may be necessary in the premises.

PARKER, DUNBAR, CROW, and MOUNT, JJ., concur.

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[No. 8530. Department One. February 17, 1910.]

ZONA H. CAMERON *et al.*, *Respondents*, v. JOHN F. LYEN *et al.*, *Appellants*.[1]

PUBLIC LANDS — RAILROAD GRANTS — RELINQUISHMENT — SETTLEMENT. Under Act Cong. July 1, 1898, 30 Stats. 620, providing that when certain railroad lands shall be settled on in good faith prior to survey, and proof thereof made, with due relinquishment by the railroad company, the company may then select other lands in lieu thereof, it is optional on the part of the company to relinquish its rights to lands settled on subsequently to the passage of the act.

PUBLIC LANDS—DECISIONS OF DEPARTMENT—RULE OF DECISIONS. Where the equities of the settler depend upon an act of Congress, rules of the department in accord with the court's construction of the act are to be given due weight.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered May 7, 1909, upon the verdict of a jury rendered in favor of the plaintiffs by direction of the court, in an action of ejectment. Affirmed.

*Austin Mires* and *E. Pruyn*, for appellants.

*Englehart & Rigg* and *Hovey & Hale*, for respondents.

CHADWICK, J.—This action was begun by Samuel J. Cameron and Zona Cameron, his wife, and Samuel J. Cameron as administrator of the estate of William Cameron, deceased, to recover all of that portion of section 21 in township 15,

[1]Reported in 106 Pac. 1111.

north of range 19 E., W. M., lying east of the Yakima river in Kittitas county. Samuel J. Cameron died after the trial, and the case is now prosecuted by Zona Cameron, in her own behalf and as executrix of the last will of Samuel J. Cameron, and by George Donald who has since been substituted as administrator of the estate of William Cameron. The lands in controversy are within the primary limits of the Northern Pacific Railway land grant. The lands were surveyed in 1903. The defendants made settlement some time in the year 1900 and, within the time prescribed by law and the rules of the land department, offered a filing in the local land office. The filing was accepted, but the fees rejected for the reason then stated that the land was embraced in the limits of an odd numbered section in the primary limits of the Northern Pacific grant, and the matter would have to be referred to the general land office at Washington, D. C. Through some oversight or inadvertence, this was never done. After the survey, the department, having no notice of defendants' claims, passed the land to patent upon the application of the railway company. On January 3, 1905, the company sold it to Samuel J. Cameron and William Cameron. The Camerons had, for several years prior thereto, held the land under a lease from the Northern Pacific Railway Company, they having determined by private survey that the land was located in an odd numbered section and eventually subject to the Northern Pacific grant. These facts appearing from the whole evidence, the trial judge sustained a motion for a directed verdict, and judgment was entered in favor of plaintiffs.

Defendants have appealed, relying upon the act of July 1, 1898 (30 Stats. at Large, 620), known as the Northern Pacific adjustment act, but more familiarly known as the Wilson bill. The only question open for our decision is whether the provisions of that act can be held to apply to one who has made settlement upon unsurveyed land within

the primary limits of the Northern Pacific grant after July 1, 1898. The act provides:

"Whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall be issued therefor."

Appellants assert that, had their filing been transmitted to the department with proper dispatch, the company would have been compelled to adjust the differences existing between the defendants and the company under the act of 1898. It is said that the question is, not whether the section of the act which we have quoted is declaratory or mandatory, but what was the intention of Congress in passing the statute. Counsel say:

"For more than twenty years homestead settlers have gone upon the odd sections within the limits of the grant on unsurveyed lands, and the railroad company has acquiesced therein and relinquished to the Government and no question has been made until some one or two recent decisions of the land department which declare it to be optional to the company whether they relinquish any of the lands or not."

Notwithstanding all this, after a most painstaking review of every case involving the adjustment statute decided by the department, we have failed to discover anything that would warrant us in so holding. The practice, as well as the only decision based upon similar facts, is against the appellants. Had the lands been surveyed no question could arise. The department, as well as the courts, has held, in an unbroken line of decisions, that such controversy must be adjusted with reference to the conditions existing at the date of the passage of the act. Such cases come within section 1 of the act. *Northern Pac. R. Co. v. Korsmoe*, 30 Land Dec.

16; *Newkirk v. Northern Pac. R. Co.*, 32 Land Dec. 369; *In re Northern Pac. R. Co.*, 34 Land Dec. 153; *Hawthorne v. Northern Pac. R. Co.*, 37 Land Dec. 569; *Humbird v. Avery*, 195 U. S. 480. By the terms of the act it was provided that the secretary of the interior should promulgate rules of practice in order to carry the statute into effect. This was done on February 14, 1899. 28 Land Dec. 103. It was there said:

"The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company or its successor in interest, and in doing so, different words and terms of description are used in different portions of the act, but considering the act in its entirety, and giving due recognition to each provision therein, this class embraces any qualified person who, prior to January 1, 1898, by settlement, entry, or purchase, initiated in good faith a claim to lands of the description given 'under color of title or claim of right under any law of the United States or any ruling of the Interior Department,' and who is still maintaining such claim conformably to such law or ruling."

And referring to the section we first quoted:

"The act makes *special provision* for instances where after January 1, 1898, a qualified person in good faith makes settlement, with a view to homestead entry, upon unsurveyed lands within the primary limits of said grant, which, upon survey, are found to be within an odd-numbered section to which the right of the railroad company has attached by the definite location of its line of road. The purpose of this provision is to afford relief to those who make such settlement before the identification by survey of the lands to which the railroad claimant is entitled. Such settlement claim must be continued and the right of the settler asserted after survey, by an application at the local land office to make homestead entry of the lands settled upon, accompanied by proof of such settlement and the continued maintenance of the claim. These claimants are not accorded the privilege of taking other lands in lieu of those settled upon, but if the proof submitted is deemed satisfactory the railroad claimant will be requested to relinquish the lands embraced in said claims and to take other lands. All the provisions of these regulations are

applicable to these lands, excepting those pertaining to relinquishments by individual claimants."

And further, in defining the status of the company under the act:

"The railroad claim is one which arises from the definite location of the line of railroad if the land is within the primary limits of the grant, or which arises from a lieu selection if the land is within the indemnity limits, and is one which, in the absence of all individual claims, would enable the railroad claimant to obtain full title to the land."

The only case in line with this one is that of *Northern Pac. R. Co. v. Violette*, 36 Land Dec. 182. In that case Violette had settled in 1902. The lands were surveyed and the township plat filed in 1905. There was no pending controversy on July 1, 1898. Speaking to the point before us, Acting Secretary Pierce, who wrote the decision, says:

"To these individual claimants the act does not extend the right of election and transfer of the claims to other lands, and it seems clear that they are not of the class required to be listed with a view to demanding relinquishment of the railway company. The contention of the company that to hold it bound to relinquish in favor of such settlers would amount to an open invitation to settle upon its unsurveyed lands with a guarantee of protection, with a resulting cloud upon the company's title and, perhaps, a bar to the disposal of its lands, is not without force, and after a most careful consideration of the entire act the Department is of opinion that the proviso above quoted merely extends a privilege to the company to select other lands for such as it may relinquish, upon such favorable terms as should reasonably induce the relinquishment, and thus protect settlement made at a time when it could not be reasonably told whether the settler would fall upon an odd numbered or even numbered section. . . . It follows from these considerations that the contention of the company must be sustained and that the provision respecting relinquishment in favor of settlements made upon unsurveyed lands after January 1, 1898, is not mandatory upon the company . . . "

This construction accords with the plain provisions of the law.

We are cautioned that no court should follow the rule of the department where it conflicts with the equities of the settler. The equities of the settler depend, like the rights of the grantees of the company, upon the act of Congress, and so long as the rules, practice, and decisions of the department accord with the act as we interpret it, and finding no authority to the contrary, we feel bound to give departmental rulings such weight as they are entitled to. We hold the relinquishment on the part of the company was optional.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

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[No. 8501. Department Two. February 18, 1910.]

BELLE MARTIN, *Respondent*, v. FRANK PIERCE, *Appellant*.[1]

VENDOR AND PURCHASER—CONTRACT—RESCISSION—TENDER OF PERFORMANCE. Where time was of the essence of a contract to purchase land, and the vendee purchased and paid for only one-half of the property, his earnest money was credited on such purchase, and he stated that he did not desire to purchase the other half, and he did not comply with the contract within the time specified, but merely filed his contract of record two months after the time had expired, it was not necessary to a rescission by the vendors that they execute and tender a deed or demand performance, but the contract was at an end when the purchaser took half of the property and declined the balance.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered April 13, 1909, upon findings in favor of the plaintiff, in an action to quiet title. Affirmed.

*Ralph Simon*, for appellant.

*Randolph E. Hilbert*, for respondent.

MOUNT, J.—The respondent brought this action to remove a cloud from the title of certain real estate in Kitsap county.

[1]Reported in 106 Pac. 1127.

On a trial of the case a decree was entered as prayed for in the complaint. The defendant has appealed.

It appears that, in the year 1907, T. E. Davis and Mary E. Davis, his wife, were the owners of the land in controversy. In July of that year appellant entered into a contract with George C. Elms, a real estate broker, as follows:

"Manchester, Wash., July 3, 1907.

"Received of Frank Pierce, fifty dollars ($50), as earnest money in the purchase of the south half of the southwest quarter of the southeast quarter, of section 21, township 24, range 2, Kitsap county, Washington, this day sold to Frank Pierce for the sum of twelve hundred dollars ($1,200), on the following terms; one-third cash, one-third in one year, and the balance in two years from the date hereof, with the privilege of paying in full at any time, with interest at 7 per cent per annum, payable semi-annually until paid, to be secured by a first mortgage on the above described property. An abstract showing marketable title to be in the undersigned is to be delivered to the said Frank Pierce within fifteen (15) days from the date hereof, the said Pierce to have fifteen (15) days after the delivery of said abstract to him to close the deal, pay the balance of cash and execute the mortgage as herein described. In case of failure to deliver the abstract as herein provided, or in case the title of the undersigned is not marketable, then fifty dollars ($50) herein receipted for it to be returned, and this receipt cancelled. But in case of the delivery of the abstract showing marketable title in the undersigned, and the failure of the said Frank Pierce to pay the amount herein specified and to execute the mortgage herein agreed to, then the fifty dollars ($50) herein receipted for is to be forfeited to the undersigned as liquidated damages for the nonfulfillment of the contract, time being the essence of this agreement. It is further agreed that there is to be no timber removed from the above described property until the second payment has been made, or with the consent of the present owner, T. E. Davis. (Signed) Geo. C. Elms,

"Agent for T. E. & Mary E. Davis."

Afterwards Mr. Pierce purchased one-half of the property and was credited with the $50, and there is evidence to the effect that he then stated that he did not desire to purchase

the other half of the property. He did not comply with the terms of the contract within the time. He testified that the time was extended. There was evidence on behalf of the respondent to the effect that the time was not extended, and that appellant refused to comply with the terms of the contract. On November 2, 1907, Mr. Pierce filed his contract of record. Thereafter in October, 1908, the respondent purchased from T. E. Davis and wife the north half of the property described in the contract set out above. Thereafter this action was brought to remove the cloud caused by the appellant's contract of record.

It is argued by appellant that respondent took title with notice of the contract, and that appellant is not in default therein because it is not shown that Davis and wife have executed or tendered a deed to him or demanded performance. It may be conceded that respondent had notice of appellant's claim. But there is evidence that appellant notified or stated to Davis and wife that he did not intend to comply with the contract and complete the purchase. If this is true, the contract was at an end, and no tender of a deed to him by Davis and wife was necessary. We think there is sufficient evidence of this fact in the record. Time was made the essence of the contract. It was therefore the duty of the appellant to tender payment, or at least within the time specified to notify Davis and wife of his readiness to comply with the terms of the contract. If time was not the essence of the contract, it was still the duty of the appellant to take reasonable steps to show his intention to comply with the terms of the contract by tendering payment when due or offering to perform; and if the vendor has declared a rescission, the vendee will be presumed to have acquiesced therein, unless the vendee's failure is shown to be the result of fraud, accident, or mistake. 2 Warvelle, Vendors (1st ed.), 864; *Moran & Co. v. Palmer*, 36 Wash. 684, 79 Pac. 476.

The only thing appellant did was to record his contract some two months after the time when he should have per-

formed. It is true he testified that he offered a check in payment of the balance of the purchase price after the time the purchase price was due, but this is denied. We think the weight of the evidence is to the effect that no offer or performance was made by the appellant, and that he notified the vendee that he did not intend to do so.

The record will not justify a reversal, and the judgment is therefore affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

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[No. 8343. *En Banc.* February 18, 1910.]

## E. S. COOK *et al.*, *Appellants*, v. GUS HENSLER *et al.*, *Respondents*.[1]

DEEDS—INTENT OF GRANTOR—EVIDENCE—ISSUES AND PROOF. The plaintiff cannot complain of the admission of evidence of the intent of the grantor as to the lands sought to be conveyed by a deed, where the complaint did not rely upon the description, but tendered an issue as to the intent, which was met by the answer.

DEDICATION—TITLE—PUBLIC LANDS—TIDE LANDS—PLATS. Where an upland owner's plat included abutting tide lands belonging to and afterwards platted by the state, the portion of the plat extending over the tide lands is void.

EVIDENCE — DEEDS — AMBIGUITY — INTENT — EXTRINSIC EVIDENCE. Where a deed granted blocks and lots designated in an upland plat which overlapped tide lands belonging to and afterwards platted by the state, there is a doubt or ambiguity in the deed as to the grantor's intent to include the tide land portion of the blocks and lots mentioned; since the upland plat was void as to such portions; and extrinsic evidence of the circumstances is admissible to show the intent.

DEEDS — CONSTRUCTION — LANDS CONVEYED — INTENT—EVIDENCE—SUFFICIENCY. The evidence is sufficient to establish that a deed of certain blocks and lots in an upland plat, which overlapped tide lands belonging to the state at the time the plat was filed, was intended to convey only the upland portion of the overlapping blocks

[1]Reported in 107 Pac. 178.

and lots mentioned, which was the only legal portion of the plat when filed, where it appears that the grantor had also acquired title to the tide lands from the state, that the deed made no mention of the overlapping tide lands as designated in the state tide land plat, and excluded the grantor's other lots and blocks of the upland plat which were wholly tide lands, that the tide land plat had been filed nine years, and the grantor and grantee testified that it was the intention to convey only the uplands.

RUDKIN, C. J., CHADWICK, and FULLERTON, JJ., dissenting.

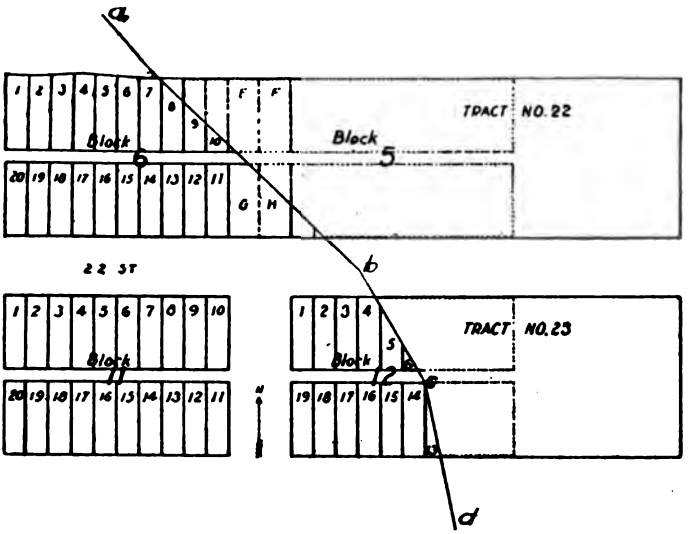
Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered January 20, 1909, upon findings in favor of the defendants, after a trial on the merits, in an action to declare a trust and obtain a conveyance of real estate. Affirmed.

*Roberts, Battle, Hulbert & Tennant* and *J. L. Corrigan*, for appellants. Where a grantor undertakes to convey tide lands by warranty deed, and the state subsequently asserts its title, the grantee may maintain an action for breach of warranty. *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763; *Osborn v. Scottish American Co.*, 22 Wash. 83, 60 Pac. 49; *People's Savings Bank v. Lewis*, 27 Wash. 344, 79 Pac. 932. A deed conveying property by reference to a plat, adopts the plat as a part of said deed, and the purchaser is thereunder bound by the boundaries of the lot as they appear in the plat. *Kenyon v. Knipe*, 2 Wash. 422, 7 Pac. 854; *State ex rel. Battersby v. Board of Tide Land Appraisers*, 5 Wash. 425, 32 Pac. 97, 775; *Masterson v. Munro*, 105 Cal. 431, 38 Pac. 1106, 45 Am. St. 57; *Schwalm v. Beardsley*, 106 Va. 407, 56 S. E. 135; *East Coast Lumber Co. v. Ellis-Young Co.*, 50 Fla. 215, 39 South. 197; *Board of Park Com'rs v. Taylor*, 133 Iowa 453, 108 N. W. 927; 2 Devlin, Deeds, § 1020; *Brown v. Taber*, 103 Iowa 1, 72 N. W. 416. Reference to a vacated plat or a void plat, is sufficient for the purpose of description. *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa 25, 65 N. W. 1017; *Young v. Cosgrove*, 83

Iowa 682, 49 N. W. 1040. The deed is to be most strongly construed against the grantor. *Marshall v. Niles*, 8 Conn. 369; *Lake Erie etc. R. Co. v. Whitman*, 155 Ill. 514, 40 N. E. 1014, 46 Am. St. 355, 28 L. R. A. 612; 13 Cyc. 628. Evidence that the parties intended to convey premises different from those stated in the deed is inadmissible to control the deed. *Jones v. Johnson*, 57 U. S. 320; *Smith v. Dudley*, 1 Littell 66, 13 Am. Dec. 222; *Ames v. Hilton*, 70 Me. 36; *Clark v. Baird*, 9 N. Y. 183; *Murphy v. Copeland*, 58 Iowa 409, 10 N. W. 786, 43 Am. Rep. 118; *Segar v. Babcock*, 18 R. I. 203, 26 Atl. 257; 17 Cyc. 616, 617, 618, 619.

*Frank Quinby*, for respondents, contended, among other things, that the portion of the Nelson plat extending over the tide lands was a nullity. *Nauerth v. Duke* (Iowa), 79 N. W. 271; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, 38 N. W. 1200, 8 Am. St. 679; *Union Depot Street R. & Transfer Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; *Cleveland v. Choate*, 77 Cal. 73, 18 Pac. 875; *Kenyon v. Knipe*, 2 Wash. 422, 7 Pac. 854. The subsequent platting of the tide lands by the state vacated that part of the Nelson plat. *Henry v. Seattle*, 42 Wash. 420, 85 Pac. 24.

DUNBAR, J.—On or about the 13th day of January, 1890, one Noah Nelson, who was the owner in fee simple of certain uplands in Skagit county, Washington, platted said land as Nelson's addition to Anacortes, Washington, and extended his plat over certain tide lands of the first class situated in front of said uplands. The following map will show the situation of the lands involved:




The line a-b-c-d is the shore line as fixed by the tide land survey. The dotted lines show the outline of that part of Nelson's addition which was platted over tide water. On the 10th day of April, 1893, Nelson executed a mortgage upon lots E, F, G, and H, all of blocks 5 and 6, all of block 11, and all of block 12 except lots 19 and 20, to the Land Mortgage Bank of Northwestern America, Limited. This mortgage was subsequently foreclosed by the mortgagee, and a sheriff's deed was regularly issued to the said mortgagee, which deed was regularly recorded, said property being conveyed to the mortgagee by the same description as was contained in the mortgage.

Subsequently to the execution of the Nelson plat, the state board of land commissioners platted the first class tide lands situated in front of the city of Anacortes, and included certain portions of the land covered by the Nelson plat as parts of tracts 22 and 23, of plat 10, of said Anacortes tide lands of the first class, which, as is shown by the map, includes portions of lots G and H, and blocks 5, 6 and 12 of the Nelson plat. On or about the 13th of April, 1894, Nelson,

exercising a preference right given him by the law, secured a certificate of sale from the commissioner of public lands, by the terms of which certificate tracts 22 and 23, together with other tide lands, were to be conveyed by a deed from the state of Washington to the said Nelson, on payment by him of the amount specified in said certificate of sale; that subsequently Nelson assigned to the Land Mortgage Bank all interest in said certificate of sale; that on the 11th day of March, 1901, the said Land Mortgage Bank conveyed to one R. R. Dewar by statutory warranty deed, the following described land: All of block 6 except lot 1, all of block 11, all of block 12 except lots 19 and 20, and lots G and H, all in Nelson's addition to the city of Anacortes, Skagit county, Washington; that thereafter, and on or about March 31, 1902, said Dewar and wife conveyed said property to E. S. Cook, one of the plaintiffs and appellants in this action, describing said property as follows: All of blocks 6 and 11, all of block 12 except lots 19 and 20, and lots G and H, said lots G and H being situated on the north side of 22d street, adjoining block 6 on the east, all in Nelson's addition to the city of Anacortes, Washington, according to the plat thereof on record in the auditor's office in and for Skagit county, Washington.

Subsequently the certificate of sale, which had been assigned to the Land Mortgage Bank by Nelson, was transferred by one Shorrock, the agent of the Land Mortgage Bank, to the defendant in this action, Gus Hensler. Some question is raised by the appellants as to the authority of Shorrock to make this transfer, but with the view we take of the other questions in the case, it is not necessary to discuss that one. Subsequently Hensler, by means of the written certificate of assignment, procured a deed from the state of Washington to tracts 22 and 23 of said tide lands, whereupon plaintiffs brought suit against Hensler and wife, praying for a decree adjudging that defendant Hensler held the title in such lands in trust for the use and benefit of the said plain-

tiffs, and that said Hensler be ordered to convey the legal title to said lands to plaintiffs.

The court made findings of fact, and from such facts concluded that the deed from the Land Mortgage Bank to Dewar did not, as a matter of law, convey any of the tide lands whatever, nor did the description of the real property therein given designate more than the upland portion of the lots and blocks therein mentioned, and that the Land Mortgage Bank parted with none of its interest in any of the tide lands lying in front of said upland property; and concluded that, as the plaintiffs, in order to obtain the relief applied for, must rely upon the title of their grantor Dewar, and that Dewar, not having received title to any of the tide lands, could not convey the same to plaintiffs, the action was dismissed.

There are several assignments of error in this case based on the findings of fact, but as we understand from the argument of the appellants the assignments are made upon the theory that the court erred in its construction of the law, and that the findings of fact were made with reference to such alleged erroneous construction rather than upon any facts stated or proven. It is also claimed that the court erred in admitting extraneous testimony to determine the intention of the parties as to what was conveyed by the deed. The main question, as stated by the appellants, is to determine whether the rights of the plaintiffs claiming by warranty deed from the dedicator Noah Nelson were affected in any way by the subsequent platting of the tide land portion of the said Nelson plat by the board of state land commissioners. A great many cases are cited by the appellants to sustain certain well-known principles of law, which may be conceded for the purpose of this case, viz: That the general rule is that reference to a plat or map in a deed of conveyance makes it a part thereof; that if a party purchases a certain numbered block of land according to the official map of the city and his purchase is so described in the deed, a further

description of the block by metes and bounds or courses and distances would be subordinate to the description of the block by its number, and would have to give way in case of conflict; and that where a deed describes land as a lot laid out on and designated on a certain plat or survey, the plat becomes as much a part of the deed as if it were copied into it. It may also be said that it is the law that when a description employed by the parties to a deed is ambiguous or uncertain, or the language used leaves it doubtful as to what was the real intention of the parties, the deed must be most strongly construed against the grantor; that where lots are conveyed with express reference to a recorded plat, evidence to control or in any way affect the plat is inadmissible; that as a general proposition the deed must be held to be conclusive evidence as to what land is intended by the grantor to be conveyed, and the quantity of land, and likewise the conclusive evidence of his intention to include in or exclude from the instrument particular land. These are all propositions which are universally conceded to be the law, but we think they have no application to this case.

First, as to the objection to the admission of testimony of Dewar as to the intention of the grantor or grantee when the deed was made from the bank company to Dewar. The complaint in this action is not brought exclusively upon the theory that the appellants were relying upon the description in the complaint, but it states in paragraph 5 that it was the intention of the seller to sell, and of the purchaser to buy, all of the land within the above named description, whether the same was upland or tide land. This was a tender of an issue of intention which was met by the answer, and the appellants are not now in a position to question the introduction of testimony which was put in evidence under issues raised by the pleadings.

On the other proposition, it may be said that, while ambiguities in the description will alone justify a recourse to evidence extraneous to the deed, yet the ambiguity is not

necessarily confined to the description of metes and bounds, or monuments, or what is generally understood as descriptions. But it may consist, as we think it does in this case, in a doubt as to whether the plat referred to was the plat as it originally existed or as afterwards restricted, a determination of which question is absolutely necessary to a correct interpretation of the deed and an ascertainment of the intention of the parties. While it is no doubt true that the words of the covenant are the primary source from which this intention is to be drawn, because they are the symbols agreed upon by the parties to denote their purpose and are generally the best and surest guide to its discovery, it must be borne in mind that, in the construction of a deed as in the construction of any other contract, the real point is, What was the intention of the parties? As was said in *Whallon v. Kauffman*, 19 Johns. 97:

"The cardinal point is, what was the intention of the parties, as derived from the deed itself? When that is discovered, it ought to be carried into effect if it can be done consistently with the rules of law. If the words and provisions are doubtful, they are to be taken more strongly against the grantor. If they are susceptible of different constructions, the court may take into consideration, the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted at the time of making the grant, for the purpose of ascertaining the probable intent."

Finding, then, that there is an ambiguity and doubt as to whether the plat referred to was the plat as it originally existed or as afterwards restricted, we will look at the circumstances of the case and the testimony adduced, not for the purpose of disputing the deed, but for the sole purpose of explaining it and of arriving at the real intent of the parties. There were two plats which covered this land in controversy at the time of the transfer, the old Nelson plat and the state plat, but that portion of the old Nelson plat which extended over the tide lands had been rendered void and of no effect

whatever by the action of the state in platting the tide lands. *Henry v. Seattle*, 42 Wash. 420, 85 Pac. 24. So that the only plat of these tide lands legally existing at the time of the purchase of Dewar was the state plat and, as was said in the case above referred to, the purchaser has a right to maintain that he purchased according to the plat legally existing at the time he purchased, and that was the testimony of both parties to the deed. The legal portion of Nelson's plat at the time of the sale covered only the uplands, and it is a more reasonable presumption that the mention in the deed of Nelson's plat had reference to a legal plat than to one which was not then in existence and, as a matter of fact, never had a legal existence, for Nelson had no title to the tide lands at the time he made the dedication. It is fundamental that title is essential to the dedicator of land, and the description should be interpreted with reference to conditions as they existed at the time of making the deed. If it had been the intention to convey the tide lands or to convey all the lands which the bank company had received from Nelson, by foreclosure proceedings and by assignment of tide land certificates, the natural thing to do would have been, after describing the uplands, to add certain portions of tracts 22 and 23, which would have placed the description beyond any question.

Again, in aid of the construction contended for by respondents, there was no attempt here by description to convey the same land that had been mortgaged to the bank, or to treat the description of said land in the way it had been treated when it was deeded to them. The mortgage given by Nelson to the Land Mortgage Bank was upon all of blocks 5 and 6, all of block 11, all of block 12 except lots 19 and 20, and lots E, F, G, and H, lying between blocks 5 and 6; and the sheriff's deed in foreclosure covered the same property. But the deed of the bank to Mr. Dewar, under whom the appellants here must recover if they recover at all in this action, did not undertake to convey block 5 at all, or

lots E and F, and these are the lots and block only that are altogether or principally covered by tide water, block 5 being all tide land excepting a very small and inconsiderable portion in the southwest corner of said block, and lots E and F being practically all in the tide lands; showing, it seems to us, that the grantor had in mind the exclusion of the tide lands from the deed, and the conveyance only of the uplands.

As bearing somewhat on a technical construction of these two deeds, it may be noted that the deed from the Land Mortgage Bank to Dewar does not describe the property as so many lots and blocks in Nelson's addition to the city of Anacortes, according to a plat thereof on record, or any plat, but simply as being said lots and blocks in Nelson's addition to the city of Anacortes; so that there is really no plat referred to in that deed, although the plat is referred to in the deed from Dewar to Nelson.

Taking the circumstances surrounding this transaction into consideration, the fact that the state plat had covered these lands for nine years before the transfer, and the material difference in the description of the land in the two different deeds, it seems to us that the conclusion is inevitable that it was the intention of the Land Mortgage Bank to convey nothing to Dewar but the uplands, and that when the deed referred to Nelson's plat, it referred to a legal plat that was then in existence. This view is strengthened by the oral testimony in the case which, notwithstanding some trivial contradictions in the oral testimony and written letters of the witness Dewar, is, as a whole, overwhelmingly in favor of respondents' contention.

The judgment of the lower court will be affirmed.

CROW, PARKER, MOUNT, MORRIS, and GOSE, JJ., concur.

RUDKIN, C. J., CHADWICK, and FULLERTON, JJ., dissent.

[No. 8117. Department One. February 19, 1910.]

## T. W. MORTIMER, *Appellant*, v. JOHN L. DIRKS *et al.*, *Respondents*.[1]

CONTRACTS—BUILDING CONTRACTS — SUBSTANTIAL PERFORMANCE—BREACH. The rule that substantial compliance with a building contract will entitle the contractor to recover a balance due thereon, or on quantum meruit, cannot be invoked in behalf of a contractor who "knowingly and wilfully violated the terms of the contract," and was guilty of fraud in "skinning the job."

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial for newly discovered evidence is properly denied where its materiality must have been known at the trial and the slightest diligence would have procured it.

NEW TRIAL—ABSENCE OF WITNESS—DILIGENCE. It is not error to refuse a new trial on account of the absence of a witness where no continuance was asked, and the same facts could have been shown by other witnesses.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 4, 1908, upon findings in favor of the defendants, in an action tried before the court without a jury. Affirmed.

*Berkey & Cowan*, for appellant, contended, among other things, that the respondents having accepted the benefits of the contract are liable for the value of the work performed. *Bush v. Finucane*, 8 Colo. 192, 6 Pac. 514; *Goldsmith v. Hand*, 26 Ohio St. 101; *Jennings v. Willer* (Tex. Civ. App.), 32 S. W. 24; *Taylor v. Williams*, 6 Wis.* 363; *Draper v. Randolph & Co.*, 4 Har. (Del.) 454; *Spencer v. Dougherty*, 23 Ill. App. 399; *Downey v. Burke*, 23 Mo. 228; *Adams v. Hill*, 16 Me. 215; *Adams v. Cosby*, 48 Ind. 153; *Thompson & Sowers v. Allsman*, 7 Mo. 530; *Dutro v. Walter*, 31 Mo. 516; *Becker v. Hecker*, 9 Ind. 497; *White v. Oliver*, 36 Me. 92. They would be liable for work accepted on an implied

[1]Reported in 107 Pac. 184.

promise to pay therefor. *Arnett v. Evans' Adm'r*, 1 Walk. (Miss.) 471; *Dermott v. Jones*, 64 U. S. 220; *Merriweather v. Taylor*, 15 Ala. 735; *Hawkins v. Gilbert & Maddox*, 19 Ala. 54; *English v. Wilson*, 34 Ala. 201; *Demoss v. Noble*, 6 Iowa 530; 6 Cyc. 70; *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268.

*Voorhees & Voorhees*, for respondents, contended, *inter alia*, that substantial compliance does not authorize a recovery by a contractor who wilfully violated his contract. 6 Cyc. 87, 88; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *Dermott v. Jones*, 2 Wall. 1; *Bertrand v. Byrd*, 4 Ark. 187; *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; *Kelly & Bragg v. Bradford*, 33 Vt. 35; *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268; *Criswell v. Directors School Dist. No. 24*, 34 Wash. 420, 75 Pac. 984; *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, 16 Atl. 36; *Ashley v. Henahan*, 56 Ohio St. 559, 47 N. E. 573. Substantial omissions or defects will be presumed to be intentional. *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; *Golden Gate Lumber Co. v. Sahrbacher*, 105 Cal. 114, 38 Pac. 635; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442.

MORRIS, J.—Appellant brought this action to recover $793.69, claimed to be due upon a contract for the erection of a house for the respondents. Of the amount claimed, $679.31 was alleged to be due under the contract, and the balance was for extras. Respondents answered, denying any liability under the contract or for the extras, and counterclaimed, demanding damages in the sum of $771.03 for alleged breaches of the contract and damages consequential to the breach. Upon a reply being filed, trial was had upon these issues, wherein the court found appellant had intentionally violated the terms of the contract in certain of its stipulations, and denied him a recovery. The court also found that respondents had failed to sustain the allegations of their counterclaims, and entered its judgment of dismissal both as

to the complaint and counterclaims, and plaintiff has appealed. No statement of facts has been sent up, and the case is here only upon the pleadings, findings of fact, conclusions of law, and judgment. The only question then before us is, do the pleadings and findings of fact sustain the conclusions of law and judgment.

The chief contention of appellant is that, respondents having accepted the benefits and fruits of the contract in that they sold the house for $3,500, which, under the contract, was the price fixed at which the house when completed should be sold, and out of the proceeds of such sale the amount remaining due upon the contract to be paid, and the court having found that respondents were not damaged under their counterclaims, the appellant was entitled to recover. This contention cannot be sustained under the findings. It is true, as asserted by appellant, and under which theory he bases his right of recovery, that it is a modern rule that substantial compliance with a building contract is all that is required, and that where the contractor has in good faith and honestly sought to comply with its terms, but has failed in some minor respects, his right of recovery cannot be defeated under the contract, but will be offset by the amount required to complete the contract. Some of the cases holding that substantial compliance only is required hold that the action is properly brought upon the contract and the amount due thereon is subject to deductions for damages arising from improper performance; while others hold that the contractor is entitled to recover upon a *quantum meruit*. But whatever be the rule of recovery, the reason for it is that a contractor, acting in good faith and with a determination to do what he has contracted to do, should not suffer if he has, unintentionally and without any negligence in some small matter, departed from the strict terms and detail of his specifications.

The rule is for the benefit of the honest, skillful and prudent contractor, who faithfully endeavors to live up to the terms

of his agreement but through mistake or inadvertence fails in unimportant particulars. *Smith v. Gugerty*, 4 Barb. 614; *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; *Windham v. Independent Telephone Co.*, 35 Wash. 166, 76 Pac. 936. But such a rule, being founded in equity, is for the benefit of those who do equity, and it cannot be invoked by those who wilfully and intentionally violate and breach their contracts.

"The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contract in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, and unimportant omissions or defects. It is incumbent upon him who invokes its protection to present a case in which there has been no wilful omission or departure from the terms of his contract." *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, 16 Atl. 36.

The appellant, according to the findings of fact, "knowingly and intentionally violated the terms of his contract." No statement of facts being before us, we must accept such a finding with all its probative force. In addition, the court finds that prior to commencing the work the appellant stated that he intended "to skin the job so as to make some money." With such a situation before us, we cannot invoke any equitable rule for appellant's protection. As against the respondents, he is guilty of a fraud, and he cannot recover in this or any other form of action.

The case is analogous to *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790, where it was held that a contractor who wilfully and intentionally refuses to comply with the terms of his contract is not entitled to recover; and the same rule must be applied here. Appellant, having broken his contract, could not make it the basis of any relief. He could not restore life to that which by his own act had become dead.

There was no error in the refusal of the new trial. The evidence submitted in the affidavits could all have been supplied at the trial with any diligence on the part of appellant. If the question of whether there was any difference between "curly fir" and "slashed grain fir," was material after the trial, it was material at the trial, and should have been produced there and then, and we apprehend that, with the number of lumber dealers and contractors in Spokane, the slightest diligence could have furnished the testimony. As to the testimony of Mr. Stern, if in the judgment of appellant his testimony would have availed him, he should have applied for a continuance until Mr. Stern's return to the city. Not, so far as the record goes, having done so or made any effort to obtain it, he cannot take advantage of his own neglect and demand a new trial, as a matter of right, in order to then produce such testimony. At all events, the same fact could have been proved by the persons to whom it is said the tender was made, and there is nothing in the record to show their inability to so testify.

The judgment is therefore affirmed.

Rudkin, C. J., Gose, and Chadwick, JJ., concur.

Fullerton, J., dissents.

[No. 8274. Department Two. February 19, 1910.]

# FRED McADAM, *Appellant*, v. BENSON LOGGING & LUMBERING COMPANY *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE OF EASEMENT—ESTOPPEL. The purchaser of land subject to an easement for a logging road cannot assert an abandonment of the easement by nonuser, where, prior to his purchase, use of the easement had been resumed with the consent of the original owner.

EASEMENTS—ABANDONMENT—EFFECT OF NONUSER. Mere nonuser for ten years of a right of way granted for a logging road will not defeat the right, or amount to abandonment of the easement, where no time was stipulated for the use and no provision was made in the grant for restoration of the land on failure to use the same.

EASEMENTS — ABANDONMENT — INTENT — EVIDENCE — SUFFICIENCY. Abandonment of an easement is not shown by the fact that the rails of a logging road were taken up and the right of way not used for ten years, where there was no provision that the land should revert by nonuser, the rails were taken up for temporary use pending litigation of the title to the timber lands served by the road, and the financial depressions of 1893 compelled further suspension of operations for several years, it being testified that there was no intention to abandon the road.

EVIDENCE—JUDICIAL NOTICE—FINANCIAL PANIC. The court will take judicial notice of the financial panic prevailing in 1893 and subsequent years.

ADVERSE POSSESSION — ESTOPPEL TO ASSERT — LACHES — EASEMENTS—ABANDONMENT. The plaintiff in ejectment, owner of the dominant estate, cannot recover land granted for a logging road or defeat the easement by reason of the fact that the rails were taken up and the right of way not used for the statutory period of ten years, where it appears that there was no intent to permanently abandon the easement, and that plaintiff had notice of the rehabilitating of the road, assisted in hauling the rails, arranged for gates at crossings, and for several years stood by while the railroad was rebuilt, without objection or demand for possession.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered June 7, 1909, upon findings in favor of the defendants, in an action to quiet title, etc., after a trial on the merits. Affirmed.

[1]Reported in 107 Pac. 187.

*B. L. Hubbell*, for appellant.

*Coovert & Stapleton*, for respondents.

DUNBAR, J.—This is an action to recover possession of, and quiet title to, a strip of land claimed by the appellant, and occupied by the respondent Wisconsin Logging & Timber Company as a logging railroad under a contract of purchase from the respondent Benson Logging & Lumbering Company. Ordway and Wideler procured the right of way, and, through different conveyances, the property came into the ownership and possession of the respondents in this case.

There are two tracts of land over which this logging road runs. One Swenson was the owner of one tract, and the contract was made with him in 1895 by the Benson Logging & Lumbering Company, wherein it agreed to, and did, give to said Swenson the sum of $500 in consideration of a right to lay a portion of the track in question. Afterwards, desiring to extend its main line across the Swenson premises in another place, another agreement was entered into for certain considerations therein stated. The second cause of action involves the land owned in 1883 by Robert McAdam and wife. On the 26th day of February, 1883, McAdam and wife executed a written instrument, which was not acknowledged, providing for the granting of a right of way to Ordway and Wideler. This instrument was assigned to the Columbia River & Grays Harbor Railroad Company by Ordway and Wideler, and that company at great expense built a private logging road on the premises described in the instrument, and for several years continued to operate the road for its own benefit. In March 1889, Robert McAdam died testate, devising the premises described in the second cause of action to his son, Fred McAdam, who is the plaintiff herein. Upon trial of the case the action was dismissed, and plaintiff appealed.

The legal questions involved in this case, both as to the consideration and the doctrine of equitable estoppel, were con-

sidered in a similar case decided by this court on the 11th day of February, 1910, *Koschnitzky v. Hammond Lumber Co.*, *ante* p. 320, 106 Pac. 900. In this case, as in that, we have had no difficulty in arriving at the conclusion that the doctrine of equitable estoppel should be applied, both as to the Swenson tract and the McAdam tract of land; so that the only distinguishing characteristic of this case is involved in the fact that, in 1891, as near as can be determined from the record, the rails which had been used on this right of way were removed to Cathlamet, and were not returned till the year 1901. From this fact it is urged by the appellant that there was an abandonment by the respondents of their right of way, and that, correspondingly, there was a right in appellant established by adverse possession. So far as the Swenson tract of land is concerned, at the time that the appellant obtained title from Swenson in 1905, the rails had been restored to their former position and the railroad had been in operation for several years, so that the appellant took title with full knowledge of the rights of respondents in this easement.

It would seem, at first thought, that the removal of rails from a right of way and the keeping of them off of the right of way for ten years might indicate an abandonment. But an abandonment is as much a matter of intention as of time. Nor will mere nonuser defeat the right to occupy a right of way for purposes expressed in a grant, when no time has been stipulated for the use; and the record shows that, in the written agreement between McAdam and his wife and the respondents' predecessors, there was no provision for the restoration of the land to the McAdams when the grantees should fail to use the land for a right of way. But in addition to this, the record shows plainly to our mind that there was no intention to abandon this railroad or right of way, but that the rails were moved for temporary use in another place, the company having timber near Cathlamet that it seemed more advisable to log at that time than the timber

which it possessed in the neighborhood of the location of this road. Mr. Ordway positively testified that there was no intention to abandon the road, but that they left that neighborhood temporarily on account of the decision of the supreme court in relation to the ownership of the land which was owned formerly by the Northern Pacific Railway Company, from which he had purchased the greater part of his holdings, and that he suspended operations there until the title to the land was settled; that before that happened, the dull times came on; that he was under bond to remove some timber down at Cathlamet which he owned, before a certain time; that these rails were taken up and moved down there for the purpose of moving that timber within the time; that in the meantime the hard times, which prevailed in 1893 and for several subsequent years, came on—times concerning which this court has several times taken judicial notice—and that they were compelled by stress of circumstances to suspend operation in the neighborhood of the road until 1901, when they returned to that location, bringing the rails back and placing them exactly as they were placed originally and upon the original right of way; that so far as the Swenson tract was concerned, this was done without any objection on Swenson's part, both he and his boys being hired to help lay the rails.

It also appears that there was no objection on the part of the appellant, Fred McAdam; that he knew of the return of the rails and of their being placed in their original position, and while he denies the statement made by one of the respondents that he helped to lay the rails, he does say, in another portion of his testimony, that he had a contract for hauling these rails at fifty cents a ton. The testimony on the part of the respondents shows, and we are impressed with its truthfulness, that he not only knew of the resumption of operations on the railroad, but was consulted in regard to where certain gates should be placed, and where cattle guards should be placed, the original agreement having made

provision for the placing of cattle guards where they were necessary; that the gates were put in as respondents understood McAdam wanted them; that it later turned out, after they had fenced the tract, that the gates were not at the places where McAdam wanted them; that McAdam came along and said they had not put them in just right, and had them change four or five posts and put them in at a different angle so as to get the gates at a little different position. And it certainly appears, without any denial whatever, that, for a period of at least several years, viz., from the rehabilitating of the railroad in 1901, until a couple of years before the commencement of this action, the appellant stood by, saw the railroad being rebuilt and restocked without any objection or demand for the possession of the land, and that no legal demand was made for the same until the commencement of this action in 1908.

Under all the circumstances of the case, we think that the record fails to show an abandonment on the part of the respondents by nonuser or otherwise, and that appellant cannot therefore invoke the statute of limitations against them.

The judgment will be affirmed.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8417. Department One. February 19, 1910.]

HENRY REHMKE, *Administrator, etc., Appellant*, v. JOHN B. FOGARTY *et al., Respondents.*[1]

APPEAL—RECORD—AFFIDAVITS. The dismissal of an action for want of prosecution, heard upon affidavits, cannot be reviewed on appeal where the affidavits are not brought up by a statement of facts.

DISMISSAL AND NONSUIT—FAILURE TO PROSECUTE. No abuse of discretion appears in the dismissal of an action for want of prosecution, where more than six years elapsed after the filing of answers before any steps were taken, and plaintiff only then moved for judgment on the pleadings after defendants' motion to dismiss.

Appeal from a judgment of the superior court for Kittitas county, Preble, J., entered April 22, 1909, dismissing an action to foreclose a mortgage for failure to prosecute. Affirmed.

*L. A. Vincent*, for appellant.

*Henry J. Snively*, for respondents.

PER CURIAM.—Appeal from judgment of dismissal for want of prosecution, and from order denying motion for judgment on pleadings.

The action was commenced in October 8, 1900, to foreclose a mortgage dated October 10, 1894, given to secure the payment of a note dated October 9, 1894, and due one day after date. Defendants appeared, filed answers, and the cause was set for trial. At the trial the court made an order directing the bringing in of a new party, which order was filed September 8, 1902, an amended complaint was filed on the same day, and on September 15 the new parties filed an answer. No steps were taken in the cause until September 22, 1908, when defendant Fogarty moved to dismiss for want of prosecution. April 8, 1909, plaintiff moved for judg-

[1]Reported in 107 Pac. 184.

ment on the pleadings; and on April 22, 1909, the court denied judgment on the pleadings, and dismissed the action for want of prosecution. Affidavits seem to have been presented to the court upon the hearing of the motion to dismiss; but no statement of facts having been brought up, we are unable to review what was before the court at the hearing, and are confined to the motions and rulings thereon.

From the record before us we cannot say that the court abused its discretion in granting the motion to dismiss for want of prosecution. There seems to have been little, if any, diligence displayed in the commencement of the action and its prosecution thereafter. More than six years elapsed from the filing of answers before any other steps were taken, and then it is defendants who move to dismiss. In *Langford v. Murphey*, 30 Wash. 499, 70 Pac. 1112, no move was made in the case for seven years, and in *First Nat. Bank of Fond du Lac v. Hunt*, 40 Wash. 190, 82 Pac. 285, nothing was done for three years, and we sustained a dismissal upon the ground here urged. These cases are decisive of the appeal. Having reached this conclusion, we do not review the ruling of the lower court on the motion for judgment.

Judgment affirmed.

[No. 8420. Department One. February 21, 1910.]

# PAT H. ROUNDTREE *et al.*, *Respondents*, v. JOHN HUTCHINSON, *Appellant*.[1]

DEDICATION—IMPLIED AT COMMON LAW—CEMETERIES. There is an implied irrevocable common law dedication of a tract of land to a public use, where it appears that the tract was, with the owner's consent, used by the entire neighborhood for a burying ground from 1854 to 1884, no grant or particular ceremony being necessary.

CEMETERIES—ABANDONMENT—DEDICATION. A burial ground is not abandoned from the fact that no new interments were made for several years, where the dead interred are not exhumed and removed by those having authority to do so.

CEMETERIES—DESECRATION—ACTIONS—PARTIES—INJUNCTION. The relatives of the dead interred in a burial ground, who sue on behalf of themselves and all others of the precinct, may maintain an action to enjoin the desecration of a burial ground impliedly dedicated to the public for use as such.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered May 21, 1909, upon findings in favor of the plaintiffs, in an action for an injunction. Affirmed.

*Reynolds & Stewart*, for appellant.

*W. W. Langhorne*, for respondents.

GOSE, J.—This is a bill in equity to restrain the defendant from desecrating a burial ground, and to establish the right to ingress and egress. There was a decree for the plaintiffs, and the defendant has appealed.

The case presented by the record is, was the tract of land dedicated to the public by the owner as a place of sepulture. The trial court found as a fact that "the declarations of consent and the conduct of Buchanan, acted upon and relied upon by the residents of Boistfort precinct from 1855 to the time of his sale to Wooley in 1884, was in fact an im-

[1]Reported in 107 Pac. 345.

plied dedication of this burying ground." Whilst the finding may more properly be termed a conclusion of law, we cannot escape the conviction that the learned trial court correctly resolved the case upon questions of both law and fact.

The case developed the following facts: One Buchanan and his wife settled upon a donation claim, of which the burial ground formed a part, in 1853, and later acquired title. They continued in the possession of the land until 1884, when they conveyed to Wooley, who conveyed to the appellant in 1887. The tract in controversy was used by the entire neighborhood as a place for the interment of the bodies of the dead, with the consent of the Buchanans, from 1854 until they conveyed to Wooley in 1884. There is some evidence that they became somewhat obdurate about the year 1874, but they continued however to consent to the use of the tract as a burial ground. About forty bodies were buried there during this period. Some time after the appellant acquired title, he forbade the use of the ground for other interments, but offered no opposition to its retention as a resting place for the bodies already buried. However, in 1908, according to his testimony, the fences inclosing the graves having fallen, he removed and burned the fencing material, removed the tombstones, and plowed and seeded the ground. The decree recites, and it is supported by the evidence, that the appellant desecrated the graves and denied access to the cemetery to relatives and friends of those who were buried there, that he wrongfully removed the monuments erected to perpetuate the memory of the dead, and that he wrongfully plowed over the graves.

The recited facts show an implied common law dedication to a public use. The distinction between a statutory dedication and a common law dedication is that the former proceeds from a grant, whilst the latter operates by way of an estoppel *in pais*. There is no particular form or ceremony necessary in the dedication of land to a public use. An im-

plied common law dedication arises from some act or course of conduct from which the law will imply an intention on the part of the owner of the property to dedicate it to the public use. Elliott, Roads & Streets (2d ed.), §§ 121, 123; *Cincinnati v. White*, 6 Pet. 431.

"An implied dedication is one arising, by operation of law, from the acts of the owner. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written. It is not founded on a grant, nor does it necessarily presuppose one, but it is founded on the doctrine of equitable estoppel. As said by the supreme court of the United States, 'the law considers it in the nature of an estoppel *in pais*,' and holds it irrevocable. It may be established by evidence of conduct, and in many ways. In one case it was declared that: 'The authorities show that the dedications have been established in every conceivable way by which the intention of the party could be manifested.' If the donor's acts are such as indicated an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete." Elliott, Roads & Streets, § 123.

The use by the public need not continue for the statutory period.

"Such use, however, ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment." *Cincinnati v. White, supra.*

The intention of the owner to dedicate, and the period of enjoyment for the creation of a public right, depend somewhat upon the nature of the use to which the property is devoted. When the owner has, as in this case, consented to the use of a particular tract of land for a place for the interment of the dead for so great a length of time, an intention to dedicate the land to the public for such purpose will be conclusively presumed, and neither he nor those claiming title through him with notice of the use will be heard to assert the absence of an intention to devote the land to the particular use.

In *Ball v. Tacoma*, 9 Wash. 592, 38 Pac. 133, the owner of a small tract of unplatted land lying between two avenues seven hundred feet apart, in such a position that the extension of Carr street southward to the avenue would include forty-three feet of the west end of his property, joined with owners of similar tracts in a petition to the city council, asking that land one hundred feet in width between the two avenues, which would be an extension of Carr street, be improved at the expense of the owners of property fronting upon it, the improvements to consist of grading and building sidewalks. The petition was granted and the improvement made. He thereafter sought to recover for the land taken and for damages to the remainder of the tract. Upon the facts stated, it was held that there was an implied dedication of the land to the public. In *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446, this court ruled, that a dedication in accordance with the rules of the common law is valid in this state; that the statute of frauds is not applicable in such cases; that an intention on the part of the owner to dedicate to a public use, followed by some act or acts clearly evincing such intention and an acceptance by the public, constitute a valid common law dedication. In *Forney v. Calhoun County*, 84 Ala. 215, 4 South. 153, in discussing the facts as tending to show an implied dedication of a tract of land as a courthouse site, the court said:

"The doctrine of equitable estoppel applies with peculiar force to cases of this kind. Where the owner of land intentionally, or by culpable negligence, leads the public to believe that he has dedicated it to a public use, he will, upon every principle of fair and conscientious dealing, be estopped from denying the fact of such dedication, to the prejudice of those whom he has thus misled."

In *Bessemer Land & Imp. Co. v. Jenkins*, 111 Ala. 135, 18 South. 565, 56 Am. St. 26, the court, considering the precise question presented here, said:

"But the proofs referred to above do tend to show a dedication; that the dead of the community, including plaintiff's

child, were buried in the cemetery with the knowledge, consent, and license of defendant, and that the plaintiff, and the public generally, were encouraged to bury their dead there. If this was true, the defendant would be estopped to deny plaintiff's rights to and possession of the spot of land for the purposes used, and it could not, therefore, any more than a stranger, unlawfully interfere with or desecrate it."

The same rule was recognized and applied in *Davidson v. Reed*, 111 Ill. 167, 53 Am. Rep. 613, and in *Tracy v. Bittle*, 213 Mo. 302, 112 S. W. 45, where the authorities are collated.

It is true that there are no reservations in the deeds in the appellant's chain of title, but both he and his grantor Wooley had notice of the existence of the burying ground, and purchased subject to the rights the public had acquired in the property. The appellant cites *Shell v. Poulson*, 23 Wash. 535, 63 Pac. 204; *Megrath v. Nickerson*, 24 Wash. 235, 64 Pac. 163; *Columbia & Puget Sound R. Co. v. Seattle*, 33 Wash. 513, 74 Pac. 670, and *Petterson v. Waske*, 45 Wash. 307, 88 Pac. 206, and argues from them that the land was not dedicated to the public for burial purposes. The first three cases recognize the rule we have announced, that an implied dedication depends upon the intention of the owner of the property to be gathered from the attendant facts and circumstances. The *Petterson* case is so variant upon the facts as to make it inapplicable. The discussion in some of the cases confuses a right or title acquired by dedication with that arising from an adverse possession. The former gets its existence from the consent of the owner, either actual or implied, whilst the latter arises from the assertion of title in hostility to that of the record owner.

*Hathaway v. Yakima Water L. & P. Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 847, and kindred cases from this court, are cited, and the argument is made that, applying the principles which they declare, the case at bar presents simply an oral license terminable at the pleasure of the licensor. These cases announce the rule that a verbal license

for an easement, such as a water ditch, is revocable at the pleasure of the owner of the land affected by the license. They have no application to this case. A parol license to a private individual to exercise some right or privilege in real property, and an implied dedication of the land to some public use where there has been an acceptance and user by the public, rest upon different and entirely distinct principles of law.

There has been no abandonment of the graveyard. Many of the bodies have not been removed. It will only lose its character as a resting place for the dead when those now interred are exhumed and removed by those having authority to remove them. It is true that for some years no new interments have been made, but it is still a place of sepulture. The appellant cannot profit from the fact that the graves have not been properly cared for, as the failure so to do is partially if not wholly due to his own perversity. *Tracy v. Bittle, supra.* Sacred memories cluster around this burial spot, unkept as it is, and its desecration shocks the moral sense of mankind and brings just reproach upon the author.

The respondents have relatives buried there and have brought this suit on behalf of themselves and all others of Boistfort precinct, which includes the burial ground. Equity will therefore afford them injunctive relief. *Tracy v. Bittle, supra.*

The decree will be affirmed.

Rudkin, C. J., Chadwick, Fullerton, and Morris, JJ., concur.

[No. 8566. *En Banc.* February 21, 1910.]

# THE CITY OF TACOMA, *Respondent*, v. NISQUALLY POWER COMPANY, *Appellant*.[1]

EMINENT DOMAIN—PRIVATE USE—STATUTES—PARTIAL VALIDITY. Under Rem. & Bal. Code, § 8005, authorizing cities to condemn property for lighting, heating, and power purposes "public and private" the word "private" will be eliminated as a nullity, as it is not so commingled with the public uses that they cannot be separated, and the remainder of the act is constitutional as a complete act capable of execution in accordance with the legislative intent (RUDKIN, C. J., FULLERTON, GOSE, and DUNBAR, JJ., dissenting).

EMINENT DOMAIN—PUBLIC AND PRIVATE PURPOSES—PLEADING—TEST. While a city cannot condemn property where the use is for commingled public and private purposes, an allegation in the city's petition that it has, since 1893, been furnishing facilities for lighting, heating and power purposes "public and private," will not defeat the proceeding; since the test is the ultimate purpose now sought, and not what was done in the past.

EMINENT DOMAIN — PUBLIC NECESSITY — POWER REQUIRED — EXPECTED INCREASE—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that there is a necessity for the acquisition of 20,000 horse power for public lighting purposes, where the city now uses 9,000 horse power under contract with a power company, that in the past three years the increase has been from 3,400 to 9,000 horse power and from 5,228 lighting meters to 11,258, with an increase of one hundred miles of wire in the last six months, and that at the same ratio, the increase in the next ten years would require 20,000 to 25,000 horse power.

EMINENT DOMAIN—PUBLIC USE — LIGHTING — PEAK LOAD — INCIDENTAL PRIVATE USE. Since a municipal power plant for electric lighting must provide for the peak load, or maximum power required on the shortest day of the year, the sale by the city of current for heating and cooking devices and running small machines such as lathes, etc., in the meantime, is so insignificant and incidental to the main public use as not to defeat the right to condemn property for the maximum public use required.

SAME—PROPERTY DEVOTED TO PUBLIC USE—LEGISLATIVE POWERS. The more extended and beneficial public use employed by a municipal corporation amounts to a reasonable necessity for and authorizes the taking of the property of a public service corporation already

[1]Reported in 107 Pac. 199.

devoted to the same public use, under Const., art. 12, § 10, declaring that the exercise of the right of eminent domain shall not be abridged to prevent the legislature from taking the property and franchises of incorporated companies; the legislature being exclusively vested with the right to determine under what circumstances, and to what extent, the power may be exercised.

SAME—STATUTES. Rem. & Bal. Code, § 8005, authorizing cities to condemn for public purposes "works, plants, and facilities," either expressly or by necessary implication grants the right to acquire works and plants of private corporations already devoted to a public use.

EMINENT DOMAIN—VALUES—PROPERTY DEVOTED TO PUBLIC USE—EVIDENCE—ADMISSIBILITY. In condemnation proceedings by a municipal corporation of the property of a public service corporation, it is not error to exclude evidence showing that the defendant was a public service corporation, where the court was extremely liberal in allowing the value of the land to be shown, and witnesses were permitted to fix great values based upon every possible use and adaptability of the property.

EMINENT DOMAIN—APPEAL—HARMLESS ERROR—INSTRUCTIONS. It being immaterial that defendant, in condemnation proceedings, was a public service corporation, it is not reversible error to instruct that it was not.

SAME—INSTRUCTIONS AS TO VALUES. In condemnation proceedings, error in instructing the jury that they should fix the values from their observations of the property assisted by the testimony, is harmless where other instructions gave the jury proper rules for determining the values, and stated that their view of the premises was to enable them to better understand the testimony.

EMINENT DOMAIN — PROCEEDINGS — DAMAGES—VALUES—PROSPECTIVE PROFITS. In condemnation proceedings, evidence of the possible profits of a business that might be carried on on the property taken is inadmissible for the purpose of showing the value of the property.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered September 14, 1909, upon findings in favor of the plaintiff and the verdict of the jury awarding damages, after a trial on the merits, in condemnation proceedings. Affirmed.[1]

*Hayden & Langhorne*, for appellant, contended, among other things, that the power to condemn property already

[1]NOTE: See, also, 54 Wash. 292, 103 Pac. 49.—REP.

held for, or devoted to, public use must be granted by express terms or by necessary implication. *Suburban Rapid-Transit Co. v. Mayor of New York*, 128 N. Y. 510, 28 N. E. 525; *Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n*, 77 Conn. 83, 58 Atl. 467; *Bishop v. People*, 200 Ill. 33, 65 N. E. 421; *New Haven Water Co. v. Borough of Wallingford*, 72 Conn. 293, 44 Atl. 235; *Baltimore & Ohio & C. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144; *City of Terre Haute v. Evansville etc. R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; Lewis, Eminent Domain (2d ed.), § 269; *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217; *Seattle & M. R. Co. v. Bellingham Bay & E. R. Co.*, 29 Wash. 491, 69 Pac. 1107, 92 Am. St. 907; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670. There is no statute in this state, which, in express terms or by necessary implication, grants the city the right to condemn property devoted to public use. *Seattle & M. R. Co. v. State, supra; Matter of City of Buffalo*, 68 N. Y. 167; *Suburban Rapid-Transit Co. v. Mayor of New York, supra.* Condemnation statutes being in derogation of the common right, are not to be extended by implication, but must be strictly pursued. *Seattle v. Fidelity Trust Co.*, 22 Wash. 154, 60 Pac. 133. The rule of "first in time is first in right" applies. *State ex rel. Cascade Public Service Corp. v. Superior Court*, 53 Wash. 321, 101 Pac. 1094; *State ex rel. Kettle Falls Power & Irr. Co. v. Superior Court*, 46 Wash. 500, 90 Pac. 650; *Nicomen Boom Co. v. North Shore Boom Co.*, 40 Wash. 315, 82 Pac. 412. It is immaterial that the plant of the defendant is not already constructed. *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; *State ex rel. Spokane Falls & N. R. Co. v. Superior Court*, 40 Wash. 389, 82 Pac. 417; *Nicomen Boom Co. v. North Shore Boom Co., supra; Suburban Rapid-Transit Co. v. Mayor of New York, supra.* The act of 1909 is unconstitutional as providing for the taking of private property

for private purposes. *Attorney General v. Eau Claire*, 37 Wis. 400; *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *Whiting v. Sheboygan & F. R. Co.*, 25 Wis. 167, 3 Am. Rep. 30; *City of Paterson v. Society etc.*, 24 N. J. L. 385; *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 48, 94 N. W. 379, 103 Am. St. 438; Lewis, Eminent Domain (3d ed.), § 315.

*T. L. Stiles*, *Frank R. Baker*, and *F. A. Latcham*, for respondent.

MORRIS, J.—This is a proceeding instituted by the city of Tacoma to condemn and appropriate certain lands and water rights lying along the Nisqually river, for the purpose of generating electric power for the city. The appellant, being an owner of certain lands sought by the city for this purpose, resisted the attempt and, from a judgment of appropriation in which it is awarded $50,000 as the value of its lands, it appeals.

Exceptions were taken by appellant to the order of the court holding the contemplated use by the city to be a public use and necessity; and various objections raised by appellant at the trial, all involving the same questions, are before us. We will not attempt to discuss them separately, except in so far as it is necessary.

It is first contended that the public utilities act of 1905 (Laws 1905, p. 300, ch. 159), as amended in 1909, under which the city is proceeding, is unconstitutional for the reason that it authorizes condemnation for both public and private use. The language of the act, in so far as this question is involved, is:

"That any incorporated city . . . is authorized to construct, condemn and purchase, purchase, acquire, add to, maintain and operate works, plants and facilities for the purpose of furnishing such city or town and the inhabitants thereof, and other persons, with gas, electricity and other means of power and facilities for lighting, heating, fuel and

power purposes, public and private." Laws 1909, p. 580, ch. 150 (Rem. & Bal. Code, § 8005 *et seq.*).

It may be accepted as well established that, inasmuch as private property may not be taken for private use, any legislative act which attempted to confer such a power would be a nullity. It may also be accepted that where, in a legislative act, there is a conferring of authority to take private property for both public and private use in such a way that the two cannot be separated, the whole act is void. But it does not follow that the use of the word "private" in the act under consideration renders this act void. In so far as such act would authorize the taking for a distinctively private purpose, it could not be upheld; but to render the whole act void it must appear that the public and private purposes are so commingled that they cannot be separated, as in the case cited by Lewis on Eminent Domain, § 206, where the act authorized the erection of a dam by a city, either for the purpose of water works for the city or for the purpose of leasing the water for private use. The purpose of the dam was manifestly two-fold, to supply the city with water for the use of its inhabitants—a public use—and to enable it to lease water for a private use. It could not be determined how much water would be desired or be necessary for one purpose, nor how much for the other, or which use was the greater. The two uses were principal uses, and were so intermingled that they could not be separated without destroying the purpose for which the dam was to be erected; and hence the whole act was void.

But in the act before us, every mentioned and described purpose is an undoubted public use. There is no commingling of public and private purposes, nor authority given under the act to use any of the facilities therein referred to for other than a distinctively municipal use. Unfortunately the word "private" is incorporated in the act, and as such a purpose is a prohibited one, to that extent the act is obnoxious to the constitutional inhibition,

and the word "private" becomes a nullity. The withdrawal of the void part does not disturb nor affect the remainder of the act, the provisions of which are useful and necessary to the growing municipalities of this state in order to supply their inhabitants with needful public utilities, and it would be inconsistent with all just principles of constitutional law to hold the enactment of such purposes void because they are associated with, but not connected with nor dependent on, another provision which is bad and which, when stricken from the act, leaves the remainder complete and capable of being executed in accordance with the legislative intent.

It is next asserted by appellant that the city is seeking in this proceeding to condemn for both public and private use, and hence the whole proceeding should fall. This contention is based upon a paragraph of the petition in which it is alleged:

"That at all times since the year 1893 the city of Tacoma has been engaged in the business of owning, operating and maintaining works, plants and facilities for the purpose of furnishing said city and the inhabitants thereof with electricity and facilities for lighting, heating, fuel and power purposes, public and private."

It is also suggested that the same fact is disclosed in the evidence. None of the ordinances which initiated this proceeding, or are in any wise indicative of the city's purpose in seeking to acquire these lands, indicate or refer to any private use or to any purpose other than a strictly municipal and public one. We have no desire at this time to enter upon any discussion of what is a public use, or the effect upon proceedings of this character where there is an attempt to commingle public and private uses. Such questions have been before this court in a number of cases, and it has been uniformly held that condemnation could not be had where the manifest purpose was partly private. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am.

St. 964, 63 L. R. A. 820; *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842; *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672; *State ex rel. Dominick v. Superior Court*, 52 Wash. 196, 100 Pac. 317, 21 L. R. A. (N. S.) 448. The same rule obtains here as announced in the interpretation of the act to determine its constitutionality; that is, the public and private use must be so blended and united that they cannot be separated. It was said in the *Harlan* case, "that where the two [public and private uses] are not so combined as to be inseparable, the good may be separated from the bad"; citing *Lake Koen Nav. etc. Irr. Co. v. Klein*, 63 Kan. 484, 65 Pac. 684; *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785, 109 Am. St. 526, 70 L. R. A. 472, and *In re Niagara Falls etc. R. Co.*, 108 N. Y. 375, 15 N. E. 429, in which last case it is said "the courts are not confined to, and it is not to be tested exclusively by the description of those objects and purposes as set forth in the articles of association, but evidence *aliunde*, showing the actual business proposed to be conducted, may be considered." So here, the right to maintain these proceedings would not be denied the city because in its petition it recited that since 1893 it had been furnishing "power purposes, public and private." It is not what the city has been doing, but what its purpose is in seeking to appropriate this land that we are concerned with. If its ultimate use of the power it now seeks is for both public and private purposes, then if those powers cannot be separated, they must both be denied.

We will now examine the evidence and see what use the city has made of its electrical power, as bearing in some measure upon what use it will put the additional power to which it now seeks. Under contract with a power company, the city now uses 9,000 horse power, and it is purposed by

the use of the power plant which is the object of these proceedings to generate 20,000 horse power. The use of power has increased in the past three years from 3,400 horse power to 9,000, and from 5,228 lighting meters to 11,258; and for the purpose of supplying its inhabitants with electricity for lighting purposes, it has strung about one hundred miles of additional wire in the last six months. It also appears that the same ratio of increase would necessitate 20,000 to 25,000 horse power in the next ten years. From this showing, it would seem that, with an average increase in population and consequent demand for additional lighting facilities, the city is justified in preparing for a plant that will create 20,000 horse power. It is evident that the growing demands of the present city and the requirements of the near future will necessitate the generation of 20,000 horse power to supply the inhabitants of Tacoma with lights and other public uses. The city electrician in his testimony, referring to the use made by the city of its present power, said: "We furnish current for lighting, and also for heating devices, cooking and ironing and things like that; also for motors;" and in response to a question seeking to elicit evidence of use of power by manufacturing plants and factories, the same witness testified: "I am sure I cannot say all the purposes; running small machines, such as lathes and grinding machines." He also testified that the city could not enter into competition with power companies for factory use, because it could not afford to make as cheap a rate, and hence could not get the business if it desired to. It was also stated that these small users above referred to were compelled to keep off the peak load.

It is manifest that, in its use of power, the city must provide for the maximum power that will be required on the shortest day of the year. This required use would be its peak load, and would be the minimum horse power to be generated by its contemplated plant, or purchased under its present contracts. This peak load would gradually lessen

until the longest day of the year, when it would be much less than its peak requirement; yet inasmuch as there is no known way whereby the city could store and save its power when not in use, it must provide, on the longest day of the year and at the time of least requirement, the same amount of power it must use on the shortest day of the year and at the time of greatest requirement. Neither will it require power for lights until the evening of the day; yet it must have as much power at high noon as on the darkest night. If, in the meantime, it permits a small mechanic to run his lathe or sharpen his tools, such a use being so insignificant and so small as compared with the necessities that must be supplied, no court would hold that such use was such a private use as to prevent the city from maintaining these proceedings. A private use incidentally included will not defeat the right to condemn for public use so long as the public use is maintained.

"There is no question but what, if a private use is combined with a public one in such a way that the two could not be separated, that the right of eminent domain may not be invoked to aid the joint enterprise. We mean by this, that the two purposes must together exist as main, or principal, ones; but where the private purpose is simply an incident, and the public use the principal, then the incident will not destroy or defeat the principal." *Lake Koen Nav. etc. Irr. Co. v. Klein, supra.*

The language of the court in *Slingerland v. Newark*, 54 N. J. L. 62, 23 Atl. 129, seems to us pertinent in view of the situation before us:

"It would, of course, be absurd for the city to construct water works adequate only for its present wants, and the prosecutor does not assert that the works now contemplated are unreasonably large in view of the city's prospective growth, or that more land is to be taken than is necessary for their construction and maintenance. Under these circumstances it is not apparent how the prosecutor can have any legal concern with the quantity of water drawn through the aqueduct, or with the use made of so much of it as the public does not need. But, at any rate, the mere fact that, as a natural

incident to the securing of public water supply, more water is obtained than is now requisite for public purposes, and that the city disposes of the surplus for an outside use, does not deprive the condemnation of its public character. The power to construct and maintain the works still rests on the municipal use, not on the disposition of the accidental excess;" citing *Spaulding v. Lowell*, 23 Pick. 71, and *State v. Eau Claire*, 40 Wis. 533.

The supreme court of the United States, while strictly adhering to the rule that private property may not be taken for private use, sees nothing objectionable in permitting the state of Wisconsin, which under legislative act reserved to itself the water power created by a dam over the Fox river, to dispose of some of its surplus water for private use, as there was no need of such surplus water running to waste and the state might thus reimburse itself for the expense of the improvement. *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254. In the note to *Wisconsin River Imp. Co. v. Pier* (137 Wis. 325, 118 N. W. 857), 21 L. R. A. (N. S.) 538, at page 543, it is said in speaking of this incidental private use:

"The principle that an incidental private use will not defeat the exercise of the power of eminent domain is also to be found stated in many cases not falling within the scope of this note for the reason that the incidental private use, so called, was merely the prospective enjoyment of the same character by a private individual, but in a greater degree than the general public and not the enjoyment of a use distinct from that which the public could share."

In the *Harris* case, *supra*, in which this court withheld the power of eminent domain, it was shown that the power was required to furnish lights to the cities of Olympia and Tumwater, to run electric cars between those two cities, and also to sell power to manufactories. Here there was a manifest combination of public and private use, and both uses were principal uses. In the case before us now, it is apparent from the evidence, which must be the controlling feature, that

the city's need of the power it seeks is a strictly municipal and public use, and that it is not seeking, in its requirement of 20,000 horse power, more than it will in the near future be required for a purely public use. And if in the meantime, or during the time when it does not require its peak load for its public use, it permits such uses as the evidence shows it now does, such use is so insignificant and so purely incidental that it will not defeat the right to condemn for the public use.

It is next contended that, appellant being a public service corporation, its property cannot be taken. It is undoubtedly well established that property devoted to a public use may not be taken for other public use without legislative grant, either in express terms or by necessary implication. The general question here involved was submitted to this court in *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670, wherein it was held that the right to determine under what circumstances and to what extent the power of eminent domain might be exercised was vested exclusively in the legislature, enforced by the constitutional provision that "the exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals." Const. art. 12, § 10. The rule was then laid down that property held by a corporation as a proprietor, and not actually devoted to a public use, could be taken by another corporation having the power of eminent domain.

Again, in *State ex rel. Skamania Boom Co. v. Superior Court*, 47 Wash. 166, 91 Pac. 637, the same question was presented, and it was held that, where there is a necessity for subjecting land devoted to a public use to some other public service, it might be condemned; and "necessity" was defined by quoting Lewis on Eminent Domain, §276: "That there was a reasonable necessity for the taking where the

public interest would be better subserved thereby, or where the advantages to the condemnor will largely exceed the disadvantages to the condemnee."

It might be suggested in this connection that the appellant, though incorporated in 1905, has not been very active in carrying out its purposes. The lands it now owns it acquired by purchase. In March, 1907, it commenced a number of condemnation suits to acquire other lands required by its general scheme, but it does not appear to have pushed these suits to a determination, or to have taken any other steps toward subjecting the waters of the Nisqually river to its power purposes. These lands are not now, therefore, devoted to any public use, nor have we any assurance that they ever will be, except the intention and purpose of the company as expressed in various resolutions of its board of trustees. We do not, however, care to rest our decision of the point before us upon this ground. As applied to municipal corporations, there is a broader and more comprehensive ground, growing out of the necessities of like situation and based upon a theory of a greater public use and more general public benefit. In *In re City of Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270, it appears that the legislature passed an act reciting that the public interest required the acquisition by the city of Brooklyn, for the public use, of the property and franchise of a water supply company, and authorized the city "to acquire the same for such use by condemnation." Upon attempting to do so, it was met by the objection that the act was unconstitutional in authorizing the condemnation of property already devoted to a public use, without designating any different or larger public use to which it was to be applied. The court found no force in the objection, and said:

"While the purpose of the water works company was public in its nature, it cannot be said to be strictly identical with the municipal purpose. A municipal corporation is a public and governmental agency. It holds property for the

general benefit, with a larger scope of use. When acquired by the municipality of the city of Brooklyn, the appellant's property would become a part of a general system, under a single management, and conducted essentially as a public work. If in order the better to subserve the public use the appropriation of private property is necessary, even though it be already devoted to a similar use, the right to make it is incident to the legislative power, and it is necessary for the general good that the right be conceded."

In *Brady v. Atlantic City*, 53 N. J. Eq. 440, 32 Atl. 271, the legislature enacted:

"That cities may take and convey from such source or sources as may be practicable, into and through said city, such quantity of pure and wholesome water as may be required . . . and to this end the said city is hereby authorized to . . . purchase of any water company water works within said city;"

and it was held that this conferred the right to condemn the plant and franchise of the water company for the benefit of the city; and the court adds that the right of eminent domain in such cases is not questioned. In *In re Mayor etc. of New York*, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. 825, an act empowering the city to acquire by eminent domain all wharf property within its limits was held sufficient to enable the city to condemn wharf property owned by a railroad and a gas company and actually occupied by them for public use. Having in mind this more extended and beneficial public use employed by municipal corporations as a governmental agency, we will refer to our statute. Its language as applied to the use here sought is:

"That any incorporated city . . . be, and is hereby, authorized . . . to construct, condemn and purchase, purchase, acquire, add to, maintain and operate works, plants and facilities for the purpose of furnishing such city or town and the inhabitants thereof and any other persons, with gas, electricity and other means of power and facilities for lighting, heating, fuel and power purposes." Laws 1909, p. 580, ch. 150, § 1 (Rem. & Bal. Code, § 8005).

It would seem that, in the employment of such language, it was the intention of the legislature to expressly grant the power of condemnation of property devoted to a public use. Otherwise there could be no meaning to the words "condemn and purchase," "works, plants and facilities." The legislature, having in mind, in many of our cities, works, plants and facilities were in use furnishing such cities with heat, power, water, and lights, sought to confer upon cities the right to acquire such plants by either purchase or condemnation. Certainly if it is not an express grant, it is at least a necessary implication. Otherwise the language could be given no force or effect whatever. The whole tenor of the act is a manifest intention to confer upon cities the right to acquire all existing public utilities, either by condemnation or purchase, or to construct their own plants for such purposes.

We will now consider several assignments or error at the trial. The court refused evidence on behalf of appellant that it was a public service corporation, and instructed the jury that it was not such a corporation. Such evidence could only be offered for two purposes: to enhance the value of the land, or to prevent condemnation on the theory of the property being held for a public use. The value of the land was to be determined by its use, situation, and adaptability. It was immaterial whether its ownership was in a public service corporation or an individual. Such fact could not add to or lessen its value; ownership is not a factor in determining valuation. The evidence shows that the court was extremely liberal in permitting evidence of value of the land and its use in connection with power purposes, and under its ruling appellant's witnesses testified to a valuation as high as $497,200. When we consider that this land was raw, wild land, it is apparent the witnesses in fixing such great values were taking every possible use and adaptability into consideration. Neither was it, in view of what we have said, reversible error to instruct the jury that appellant was not

a public service corporation. Whether it was or was not was irrelevant to any question submitted to them.

Error is also assigned in an instruction in which the jury were told, in fixing the values: "You should determine from your observations of the property sought and assisted by the testimony of witnesses who have testified as to the value of the same." This was not a correct statement of the law, and standing alone it might have been held error; but the court in other instructions gave the jury proper rules for determining the values, and said to them that their view of the premises was to enable them to better understand the testimony. Taken as a whole, the instructions upon this point fairly stated the proper rule.

Complaint is made of an instruction in which the court withdrew from the jury evidence given by appellant of the possible profits which might be derived from a power plant upon appellant's lands. Such instruction was proper. We do not consider that, in determining the value of land for condemnation purposes, evidence of possible profits of a business that might be carried on there is admissible for any purposes. Other errors are assigned, but they are disposed of in what has been said, and this opinion is now too long to permit of any separate discussion of them.

The judgment is affirmed.

MOUNT, PARKER, CROW, and CHADWICK, JJ., concur.

RUDKIN, C. J. (dissenting)—It seems to me the majority have found a simple solution of a difficult problem. As I read the act of March 17, 1909, Laws of 1909, page 580, it authorizes cities and towns to condemn plants and facilities for the purpose of furnishing such cities and towns and their inhabitants, *and any other persons*, with electricity for lighting, heating, fuel, *and power purposes, public and private.* If the act means what it says, it authorizes cities and towns to exercise the right of eminent domain and condemn property and plants to enable them to generate electricity to be

sold, distributed, and used for *private power purposes*, a right this court has repeatedly denied to other corporations. The majority apparently concede this, for they find it necessary to read the word "private" out of the statute. In other words, in order to satisfy one provision of the constitution, they violate another, by usurping powers vested in a different department of the government, viz., the power to make and amend laws. I find no fault with the incidental and subsidiary uses that may be made of electricity generated for public purposes, under the majority opinion, but this is begging the whole question. The private uses are not subsidiary or incidental. The city of Tacoma might sell and dispose of all electricity generated for what this court has heretofore denominated private purposes, and still keep within the provisions of the statute. The word "private" was used in this connection advisedly, for in the earlier part of the same section cities are authorized to operate water works for the purpose of furnishing such cities and the inhabitants thereof, *and any other persons*, with an ample supply of water *for all uses and purposes, public and private, including water power and other power derived therefrom.* In view of these several provisions, I find no justification for the claim that the private uses are merely incidental. If this is the proper construction of the statute—and in my opinion it admits of no other—the entire act is void, because it is left entirely optional with the city whether property acquired by condemnation shall be devoted to a public or a private use. *Attorney General v. Eau Claire*, 37 Wis. 400, 436; *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 48, 94 N. W. 379, 103 Am. St. 438; *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672.

The judgment should be reversed, with directions to dismiss the action.

FULLERTON, GOSE, and DUNBAR, JJ., concur with RUDKIN, C. J.

[No. 8295. Department Two. February 21, 1910.]

SOPHIA BECKMAN *et al.*, *Appellants*, v. HENRY BROMMER, *Administrator*, *Respondent*.[1]

APPEAL—PROCEEDINGS FOR TRANSFER—NOTICE—NECESSARY PARTIES. Upon appeal by heirs from an order of final distribution allowing an administrator's account, other heirs not joining in the appeal, who appeared at the hearing and filed exceptions to the account, are necessary parties upon whom notice of appeal must be served or the appeal will be dismissed, under Rem. & Bal. Code, § 1720.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered February 25, 1909, in favor of an administrator, upon final accounting and distribution. Appeal dismissed.

*R. M. Dye* and *L. Davies*, for appellants.

*H. J. Hibschman* and *Merritt, Oswald & Merritt*, for repondent.

CROW, J.—On March 14, 1908, Henry Brommer, administrator of the estate of Peter Haak, deceased, filed in the superior court of Lincoln county his final report and petition for distribution. Thereupon appellants, Sophia Beckman and seven others, as heirs at law of the decedent, filed written exceptions to the report, objecting to the allowance of certain credits claimed by the administrator. Like exceptions were filed by other heirs. On final hearing, the exceptions were all overruled, and an order was entered approving the report and directing a final distribution. From that order this appeal is prosecuted.

The respondent administrator has moved this court to dismiss the appeal, for the reason that the appellants have failed to serve any notice of appeal on Johann H. Haak, Margaretha Haak, and Mathilda Pate, heirs at law of the decedent. The record shows that written exceptions to the

[1]Reported in 107 Pac. 190.

final report were filed by the heirs last named, that they appeared by their attorney on the final hearing, and that no notice of appeal has been served upon them, or any of them. Section 1720, Rem. & Bal. Code, provides that:

"All parties whose interests are similarly affected by any judgment or order appealed from may join in the notice of appeal whether it be given at the time when such judgment or order is rendered or made, or subsequently; and any such party who has not joined in the notice may at any time within ten days after the notice is given or served, serve an independent notice of like appeal, or join in the appeal already taken by filing with the clerk of the superior court a statement that he joins therein or in some part thereof, specifying in what part. Any such party who does not so join shall not derive any benefit from the appeal unless from the necessity of the case; nor can he independently appeal from any judgment or order already appealed from, more than ten days after service upon him of written notice of the former appeal, unless such former appeal be afterwards dismissed. . . . When the notice of appeal is not given at the time when the judgment or order appealed from is rendered or made, it shall be served in the manner required by law for the service of papers in civil actions and proceedings, upon all parties who have appeared in the action or proceeding."

The evident intention of this section is, (1) to guarantee an appeal to all parties similarly situated; (2) to avoid separate appeals, bringing a cause to this court by piecemeal; (3) to compel aggrieved parties to prosecute their joint and several appeals at one and the same time; and (4) to accomplish these results by requiring all such parties who have appeared to be served with notice of appeal. Otherwise, one aggrieved party might, by his own diligence aided by that of the respondent, perfect an appeal and cause the same to be heard in this court before the time had expired within which other parties similarly situated would be entitled to serve their notices of appeal.

For the want of proper service, and under repeated de-

cisions of this court, this appeal will have to be dismissed. Our present holding is not inconsistent with the rule announced in *Sipes v. Puget Sound Elec. R. Co.*, 50 Wash. 585, 97 Pac. 723. In that case, although notice of appeal had not been served upon the defendant Dimmock who had appeared, the record disclosed judgment had been entered in his favor. He had not been aggrieved, nor could he prosecute an original or a cross-appeal. We there said:

"Dimmock was a successful litigant. There was no order from which he could appeal, and we fail to understand how the neglect to serve him with appellant's notice deprived any party of benefits to be derived from the appeal, or prevented the respondent from perfecting an appeal in his own behalf against the defendant Dimmock. While it is true that § 6504 directs that service be made upon all parties who have appeared, it is apparent that the sole purpose of such notice to appearing parties, other than the prevailing one mentioned in § 6503, was that in the event of their having an interest in the appeal, they might join therein, if they so desired. In other words, the object of the statute was to require all interested parties to jointly prosecute their appeals and cross-appeals instead of bringing them to this court by piecemeal."

Here the appearing heirs at law were unsuccessful litigants, were all aggrieved by the final judgment, and were entitled to either an original or a cross-appeal. The reason and necessity for serving them existed, and such service should have been made. The appeal is dismissed.

Rudkin, C. J., Mount, Dunbar, and Parker, JJ., concur.

[No. 8472. Department Two. February 21, 1910.]

BESSIE ANDERSON, *Respondent*, v. SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY, *Appellant*.[1]

TAXATION—ACTION TO RECOVER LANDS SOLD—LIMITATIONS. An action to quiet title to land sold for taxes, attacking the validity of the tax foreclosure, is within Rem. & Bal. Code, § 162, providing that actions to set aside or cancel a tax deed or for the recovery of lands sold for delinquent taxes must be commenced within three years from and after the date of the issuance of the treasurer's deed.

Appeal from a judgment of the superior court for Franklin county, Zent, J., entered January 6, 1909, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to quiet title. Reversed.

*Cannon & Lee* (*Carey & Kerr*, of counsel), for appellant.

*Horrigan, O'Brien & Coad*, for respondent.

CROW, J.—This action was commenced in the superior court of Franklin county, by Bessie Anderson against Spokane, Portland & Seattle Railway Company, a corporation, to quiet title to certain lots in the city of Pasco. The controlling question involved is the validity of a tax foreclosure, under which the defendants deraigned and now hold title. The defendant railway company demurred to the complaint for want of facts sufficient to constitute a cause of action, and because the action was not commenced within the time limited by law. The demurrer being overruled, final judgment was entered annulling the tax sale and quieting plaintiff's title. The defendant railway has appealed.

The respondent in her complaint attacks the tax foreclosure proceedings, contending that they were void for want of jurisdiction and for other reasons, all of which were raised in *Timmerman v. McCullagh*, 55 Wash. 204, 104 Pac. 212.

[1]Reported in 107 Pac. 183.

In that case, which arose out of the identical tax foreclosure proceeding here involved, we held against each and every contention now made by the respondent.

The record shows that the tax judgment was entered on June 4, 1902, and that the tax deed under which the appellant deraigns its title was executed and delivered on August 23, 1902. This action was commenced on June 13, 1908. Laws 1907, page 398, ch. 173 (Rem. & Bal. Code, § 162), provides:

"Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed: Provided, This act shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of this act."

Under the construction placed on this statute in *Cordiner v. Dear*, 55 Wash. 479, 104 Pac. 780, it is manifest that this action was not commenced within the time limited by law.

The judgment is reversed, and the cause remanded with instructions to sustain the demurrer, upon both of the grounds therein stated.

Mount, Dunbar, and Parker, JJ., concur.

Rudkin, C. J., concurs in the result.

[No. 8484. Department One. February 23, 1910.]

# Herbert E. Thorne, *Appellant*, v. Ruth Farrar, *commonly known as Ruth Thorne, Respondent*.[1]

Marriage—Annulment—Fraud—Statutes. Rem. & Bal. Code, § 7162, authorizing the annulment of a marriage for fraud is merely jurisdictional and refers to the force or fraud of the unwritten law of marriage contracts.

Same—Duress—Evidence—Sufficiency. Duress as ground for annulment of a marriage must be shown by clear, satisfactory, and convincing evidence; and the evidence is insufficient where it appears that the plaintiff, a young man 26 years of age, upon demand of an attorney and a police officer, accompanied them to defendant's home, where he was charged with the paternity of defendant's unborn child, and threatened by defendant's mother with a criminal prosecution if he refused to marry; that he then agreed to meet them the next morning to go to another city and marry the defendant, which arrangement was carried out; that he did not see the officer or attorney after the agreement and had ample time before the marriage to consult relatives or an attorney; and that at the trial he exercised his privilege of refusing to answer as to whether he had carnally known the defendant, and was apparently persuaded to marry by the promptings of conscience rather than by threats of prosecution.

Same—Duress—Charge of Seduction—Probable Cause. A marriage entered into by a man in order to secure his release from arrest on a charge of seduction will not be annulled on the ground of duress, where the charge was not made maliciously or without probable cause, and he did not aver and prove the falsity of the charge.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 8, 1909, dismissing, on the merits, an action in equity. Affirmed.

*Vince H. Faben* and *S. H. Kelleran*, for appellant.

*James M. Gephart* and *Charles E. Patterson*, for respondent.

Gose, J.—This is a suit in equity brought for the purpose of annulling a marriage on the alleged ground of duress. At

[1]Reported in 107 Pac. 347.

the close of the plaintiff's evidence, a judgment of dismissal was entered on the insufficiency of the evidence. The plaintiff has appealed.

The duress alleged in the complaint is that an attorney and a police officer, at the instance of the respondent, for the purpose of coercing and intimidating the appellant to enter into a marriage contract with the respondent, made threats to the appellant, "that they would continue and complete a certain criminal action then pending, wherein the plaintiff was charged with criminal seduction of a female under the age of eighteen years, and that said defendant was the female referred to; that the respondent wrongfully charged that the appellant was the father of an unborn child of which she was soon to be delivered; that a warrant had been issued and was in the hands of the officer; that she placed the appellant under arrest in virtue of the warrant, and compelled him by fear of a criminal prosecution to enter into the marriage relation; that she represented to the appellant that she was under the age of eighteen years, when in fact she was of the age of nineteen years." The respondent joined issue on the allegations of duress and misrepresentation.

Our statute, Rem. & Bal. Code, § 7162, provides that a marriage is voidable at the suit of the injured party "when the consent of either party shall be obtained by force or fraud." The statute does not define the kind or degree of force or fraud required to annul a marriage. Similar statutes, however, have been construed as being merely jurisdictional, and to mean that kind of force and fraud defined by the unwritten law applicable to marriage contracts. *Franke v. Franke* (Cal.), 31 Pac. 571, 18 L. R. A. 375; Bishop, Marriage & Divorce, §§ 475, 478; *Foss v. Foss*, 12 Allen 26.

The record discloses, that the appellant was twenty-six years of age at the time of the marriage; that the day preceding the marriage an attorney and a police officer, or one believed by the appellant to be such, called upon the appellant at the place where he was working; that the attorney

said to him: "You have been intimate with a certain young lady that you know. You understand what I mean. There is no need of my explaining these matters"; that the attorney "gave him to understand" that the respondent was under age, and that her mother had caused a warrant to issue for his arrest charging that the appellant had "been intimate" with the respondent; that he then inquired whether appellant would marry her, to which the latter replied that he would not; that the officer then approached and said, "So I understand you refuse to go?"; that the appellant answered that he did; that the officer then showed a badge which the appellant believed to be the badge of an officer, saying, "I am here to see that you do go." The appellant further stated that he, the attorney, and the officer then went to the home of the respondent; that her mother asked him if he intended to marry the respondent, he answering that he did not; that she then said, "Well, if you don't, I will start criminal proceedings against you"; that thereafter a general conversation took place from which the witness "understood" that, if he did not marry the girl, he would be sent to jail or the penitentiary. The appellant then agreed with the respondent and her mother that he would go with them to Tacoma on the following day, procure a license, and have the marriage ceremony performed. This arrangement was carried out. the appellant meeting the respondent and her mother the next morning at nine o'clock, at the depot, where they took the train to Tacoma, procured a license, and secured a minister who united the appellant and the respondent in marriage. After the marriage ceremony had been performed and after the three had lunched together, the mother returned to her home and the appellant and the respondent repaired to a sleeping room in the hotel, which the former had procured, and remained there for several hours, returning to her home late in the afternoon, where they had dinner. The parties have not lived together as husband and wife, and the appellant asserts that they have not cohabited since the marriage.

There is no claim that either the officer or the attorney saw the parties after the appellant agreed to the marriage on the evening preceding its celebration, or that he was under any restraint after that time. Nor is there any evidence of an arrest, other than a constructive one. Do these facts constitute duress? We think not. Whatever construction the appellant may have given the language or the conduct of the officer and the attorney before he went to the home of respondent, he was there advised by her mother that criminal proceedings would be commenced if he did not marry the respondent, plainly implying that a warrant had not then issued. The record discloses that, at the time of the marriage, the respondent was three months over eighteen years of age. This, however, is unimportant as the charge was not statutory rape, but seduction. On cross-examination the appellant was asked whether he had carnally known the respondent, and he declined to answer, claiming a privilege which the court sustained. It appears, however, by clear implication from the complaint that he had carnally known her. He alleged that she represented that he was the father of the child and that she was otherwise chaste. Regardless of the effect the statements of the attorney and the officer may have had upon the appellant, he had ample time before marriage in which to consult relatives, friends, or an attorney if he desired, and determine for himself whether he would carry out his contract. We are persuaded that the promptings of conscience and not threats moved him to marry the respondent and make the reparation that honorable conduct demanded. As was said in *Meredith v. Meredith*, 79 Mo. App. 636:

"Threats and acts of intimidation do not necessarily prove duress, and where the party was under a moral obligation to enter into or discharge a contract, the presumption is that he acted from a sense of moral duty, and this presumption should be weighed in the scale against the evidence of duress, . . . "

The burden is on the appellant to sustain the allegations of duress, and where it is sought to annul a marriage contract, a decree will not be granted except upon production of clear, satisfactory, and convincing evidence. 26 Cyc. 913; *Foss v. Foss, supra.* The fact that the appellant was reluctant to make a promise of marriage is not evidence that he did not yield his free and full assent to the marriage which was solemnized upon the day following, upon his own procurement.

Assuming that there was a constructive arrest, there is another ground upon which a court of equity will decline to annul the marriage. If a man lawfully arrested on process for seduction, the prosecution being based upon probable cause, marries the woman to procure his discharge, he cannot annul the marriage upon the ground of duress. *Marvin v. Marvin*, 52 Ark. 425, 12 S. W. 875, 20 Am. St. 191; *Jackson v. Winne*, 7 Wend. 47, 22 Am. Dec. 563; *Sickles v. Carson*, 26 N. J. Eq. 440.

"A marriage brought about by force, duress, abduction, or terror under threats may be annulled. But these influences must have been brought to bear by the other contracting party or with his procurement or connivance. And threats of any legal or penal measures authorized by law and the circumstances of the case will not invalidate the contract. Thus, in particular, if a man under lawful arrest for seduction or bastardy, the complaint being based on probable cause, chooses to marry the woman as a means of obtaining his release and terminating the proceedings against him, he cannot allege duress as a ground for annulling the marriage. But it is otherwise if the prosecution was maliciously instituted and without probable cause, or if the accused, being pliant and inexperienced, is bullied by the magistrate and yields under threats of more severe penalties than the law allows." 26 Cyc. 906, 907.

Not only does the moral obligation of the appellant appear from the complaint by clear implication, as we have seen, but the respondent in her answer admits that she represented to the appellant that she was with child by him, and

avers that the representation was true. We find no denial of this in the record. If the appellant had not carnally known the respondent, he knew the charge of seduction was false, and if he was induced to marry her through duress and desired to avoid the marriage contract on that ground, it certainly devolved upon him to aver and prove the falsity of the charge. If he had carnally known her and married her to avoid being prosecuted, in the absence of evidence, probable cause will be presumed and there was no duress.

The decree is affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

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[No. 7951. Department One. February 24, 1910.]

JAMES DUVALL, *Administrator etc. et al., Appellants*, v. HEALY LUMBER COMPANY, *Respondent*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—DESCENT—RIGHTS OF SURVIVOR—CONVEYANCE BY. Upon the death of the wife, leaving children, a deed by the surviving husband purporting to convey the entire community property, which descended one-half to him and one-half to the children, is not void, but is effectual to convey his one undivided one-half interest, which on the wife's death became his separate property.

EXECUTORS AND ADMINISTRATORS—NECESSITY FOR ADMINISTRATION—LIMITATIONS—DESCENT AND DISTRIBUTION. Under Rem. & Bal. Code, § 1366, providing that the fee title to lands shall vest in the heirs or devisees immediately upon the death of the ancestor, subject to debts, and § 1368, providing that no real estate shall be liable for the ancestor's debts unless letters be granted within six years after his death, administration upon community real estate is not necessary thirteen years after the death of the wife.

SAME—ACTIONS BY ADMINISTRATOR—RECOVERY OF LAND—UNNECESSARY ADMINISTRATION. An administrator of community real estate, appointed without any necessity for administration, after the expiration of the six years within which letters must be granted in

[1]Reported in 107 Pac. 357; 109 Pac. 305.

order to charge the land with the debts of the deceased, cannot maintain an action to recover the land, title to which had, by Rem. & Bal. Code, § 1366, vested in the heirs (RUDKIN, C. J., dissenting).

Appeal from a judgment of the superior court for King county, Morris, J., entered October 19, 1908, upon findings in favor of the defendant, in an action to recover real estate, after a trial on the merits before the court without a jury. Affirmed.

*Vince H. Faben* and *S. H. Kelleran*, for appellants, contended, *inter alia*, that the regularity and necessity for the appointment of an administrator could not be questioned in a collateral proceeding. *Scott v. McNeal*, 5 Wash. 309, 31 Pac. 873, 34 Am. St. 863; *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648; *McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 240. The lapse of six years does not defeat the right to administration. *Morgan v. Casey, Adm'r*, 73 Ala. 222. Claims may be filed and suit brought, although the statute releases the real property from the payment of debts. *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533; *Frew v. Clark*, 34 Wash. 561, 76 Pac. 85; *Fuhrman v. Power*, 43 Wash. 533, 86 Pac. 940; *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765. Absence of debts does not deprive the administrator of his right to the possession of the real property. *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648. Administration is necessary for the purpose of distribution. *Morgan v. Casey, supra; Pendley v. Madison's Adm'r*, 83 Ala. 484, 3 South. 618.

*Brownell & Coleman*, for respondent.

FULLERTON, J.—On December 2, 1886, James Duvall purchased 160 acres of land, lying in King county, Washington. At that time Duvall was a married man, living with his wife, and the real property so purchased became the community property of himself and wife. To Duvall and wife were born four children: George W., born December 3, 1878; James C.,

born March 26, 1883; Lena, born September 18, 1885; and Olive, born June 6, 1889. On January 9, 1890, Annie Duvall, the wife, died intestate. Thereafter and on December 15, 1892, James Duvall, representing himself to be a single man and the sole owner of the property above described, sold and conveyed the same by warranty deed to Henry Hewitt, Jr., for the consideration of $1,500. Hewitt thereafter conveyed the property to The Everett Timber & Investment Company, which in turn conveyed it to the present respondent on January 20, 1901. Hewitt took possession of the property shortly after his purchase of the same, and he and his successor in interest have been in possession ever since, during which time they have paid all taxes and assessments levied thereon.

In the month of November, 1903, nearly thirteen years after the death of his wife, James Duvall procured himself to be appointed administrator of her estate, and in March, 1904, began this action against the respondent to recover the land described, averring that his deed thereto to Henry Hewitt, Jr., was void and of no effect. In the title to his complaint he purports to sue as administrator of his wife's estate and as guardian *ad litem* of his children, but at the trial he offered no evidence tending to show that he had been appointed either their permanent guardian or guardian *ad litem*, and he must recover in this action, if he recovers at all, in his capacity as administrator solely. Two of the children, at the time of the commencement of the action, were minors, but they had reached the age of majority at the time of the trial. None of them intervened or offered to intervene in the action. The court held that the respondent was not entitled to recover, and dismissed the action. From the judgment of dismissal the administrator has appealed.

The appellant, both in his complaint and in his brief, seems to contend that his deed executed after his wife's death passed no title whatever in this land to the grantee named therein, but manifestly this is not maintainable. The property, being

the community property of the appellant and his wife, passed on her death, in the absence of testamentary disposition, one-half to the appellant and one-half to the legitimate issue of her body. The appellant's interest then became his separate property, subject to his sole disposition, and his deed of the property passed to the grantee named therein such interest. The fact that he attempted to convey a greater interest than he had did not avoid the conveyance as to the part owned by him. The deed passed his interest, however ineffective it may have been to pass interests which he did not possess. There is nothing in the case of *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172, cited by the appellants, that supports a contrary doctrine. In that case it was held that community property, acquired at a time when the law empowered the husband to convey property so acquired, could not be conveyed by him after his wife's death under a statute providing that community property should pass on the death of one spouse one-half to the surviving spouse and one-half to the legitimate issue of her body. It was not questioned, however, that the husband could convey his interest therein; on the contrary, it was inferentially stated that he could. See opinion, p. 664. The appellant's grantee, therefore, acquired by the appellant's deed an undivided one-half interest in the property and became thereby a tenant in common in the property with the children of appellant. The grantee's interest was taken, of course, subject to community debts, and subject to the right of administration, had letters of administration been seasonably applied for, but subject to these rights he took the fee and could and did convey the interests acquired by him to the respondent. It follows, therefrom, that the respondent has such an interest in the property as will enable it to contest the right of the appellant to administer upon it.

The question for consideration is then, does there exist a necessity for the administration of this estate. The statute,

Rem. & Bal. Code, § 1366, provides that when a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration, and any other charges for which such real estate is liable under existing laws, and that no administration of the estate of the deceased, and no decree of distribution or order of any court shall be necessary in any case to vest such title; and by § 1368, it is provided that no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such deceased person.

Under these statutes it is plain that there is no necessity for an administration of this property. There are no debts to which it can be subjected, and the title is fully vested in those who are rightfully entitled thereto. If it should be delivered over to the administrator he could do nothing more than deliver it back to those rightfully entitled to it burdened with the costs of administration caused solely by his interference. If there is any controversy by the heirs of the appellant's deceased wife and the respondent over the title or right of possession of the property, that controversy can better be settled by an action directly between the parties than it can in a proceeding brought to administer upon an estate. Where a contest over the ownership of property arises when an attempt is made to distribute property administered upon, which has been properly subjected to an administration, it is proper, of course, to determine the controversy in the administration proceedings, but such a controversy cannot, of itself, give rise to the necessity of an administration. These principles we think are sustained by the cases of *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765; *Anrud v. Scandinavian-American Bank*, 27 Wash. 16, 67 Pac. 364, and *Murphy v. Murphy*, 42 Wash. 142, 84 Pac. 646.

The respondent, however, relies on the case of *Gibson v.*

*Slater*, 42 Wash. 347, 84 Pac. 648, but it will be noticed that the writer of the opinion in that case carefully distinguished it from the cases above cited, pointing out particularly that a period of six years had not elapsed between the date of the death of the intestate and the appointment of the administrator, and that possible debts of the deceased had not been barred. Speaking with reference to the case of *Murphy v. Murphy, supra*, it was said:

"In the *Murphy* case we said: 'We are of opinion that, under the facts shown, no real necessity existed for any administration in this state, eleven years having elapsed since the testator's decease, and his estate in Iowa having been fully settled there by a court of competent jurisdiction. Had any good and sufficient reason existed at any time for administration in Washington, the interested party desiring the same should have applied for the appointment of an administrator within at least six years after the death of said J. H. Murphy.'

"It will thus be seen that our holding in the *Murphy* case was based not only upon the provisions of § 4640, but also of § 4642. Here the appellant Frank Slater failed to procure letters of administration on the estate of his deceased wife, but instead seized upon and claimed title to all of the real estate, adversely to her heirs at law, issue by former marriages; and respondent, a little more than three years after her death, within the six years mentioned in Bal. Code, § 4642, was appointed administrator, apparently for the express purpose of protecting the interests of said heirs, a number of whom are minors. It is true appellant contends there were no outstanding debts, and has alleged he paid all that ever existed, but that makes no difference, as the heirs at law are here entitled to have the administrator recover and distribute the real estate free from the possibility of any such liens."

We conclude, therefore, that there was no necessity for administering upon the estate of the appellants' intestate, and the judgment will stand affirmed.

CHADWICK and GOSE, JJ., concur.

RUDKIN, C. J. (dissenting)—This is a collateral attack on letters of administration issued by a court of competent jurisdiction, and the conclusion of the majority can only be sustained upon the ground that letters of administration granted more than six years after the death of the intestate are null and void. In that conclusion I cannot concur.

MORRIS, J., took no part.

## ON REHEARING.

[*En Banc.* June 25, 1910.]

PER CURIAM.—A hearing *en banc* was granted in this cause and the same has been argued by the appellant before the full court. While a majority of the court have voted to adhere to the department decision, it has deemed it best to notice again the contention of the appellant to the effect that the department erred in holding that the appellant sued originally as administrator, solely, and not as guardian *ad litem* of his then minor children. Since the argument, we have again consulted the record on this point and are unable to find that any proper steps were taken to make these children parties while they remained minors, or that they have interpleaded or otherwise appeared in the action since they reached the age of majority. We emphasize this point so that the judgment appealed from may not be treated as a bar to any action these children in their individual capacities may deem fit to bring against the respondent.

The judgment will stand affirmed.

[No. 8435. Department One. February 24, 1910.]

BANAGETAS ANUSTASAKAS *et al.*, *Respondents*, v. INTERNATIONAL CONTRACT COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—EXCAVATIONS—QUESTION FOR JURY. The negligence of an employer resulting in the death of an employee from the caving in of a trench, is for the jury, where he was directed to work in the trench seven or eight feet deep, the sides of which were not braced as was usual and customary, and that a fellow servant directed the foreman's attention to a crack in the wall opposite the servant's working place a few minutes before the accident, and the foreman did not warn the servant or take any steps to protect him.

MASTER AND SERVANT—ASSUMPTION OF RISKS—EXCAVATIONS—UNKNOWN DANGERS. It cannot be said that a laborer in a trench seven or eight feet deep assumes the risk of a cave-in of unbraced walls, as a matter of law, where the master's evidence was directed to proving that it was not customary to brace the walls in excavations in soil of that character, and the master had directed the servant where to work, and impliedly assured the safety of the place.

MASTER AND SERVANT—NEGLIGENCE—OBEYING DIRECTIONS. A direction to a laborer to work in a certain place in a trench, impliedly assures its safety, and directs him to "stay" until the work is completed.

MASTER AND SERVANT — SCOPE OF EMPLOYMENT — INSTRUCTIONS. Upon an issue as to whether a laborer in a trench unnecessarily stayed therein after completion of the work, an instruction that there could be no recovery if he stayed an unreasonable length of time after completion of the work, is as favorable to the defendant as the facts would warrant.

MASTER AND SERVANT—NEGLIGENCE—DUTY TO WARN—ISSUES—INSTRUCTIONS. Where a complaint charges negligence in directing a laborer to work in a trench, with knowledge that the walls were unsafe, an instruction relative to the duty of the master to give warning upon receiving notice of the unsafety of the walls is not objectionable as not being in harmony with the complaint.

WITNESSES—CROSS-EXAMINATION. It is not error to ask a witness upon cross-examination if he had been paid for his testimony, there being no attempt to show a settlement for liability to him arising out of the matter in suit.

[1]Reported in 107 Pac. 342.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 22, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for wrongful death. Affirmed.

*Roberts, Battle, Hulbert & Tennant*, for appellant.

*Brady & Rummens*, for respondents.

Gose, J.—This is an action brought by the widow and the minor children of G. K. Anustasakas, deceased, against the appellant, for damages for personal injuries to the deceased causing his death, occurring, it is alleged, through the negligence of the appellant. The minors have appeared by a guardian *ad litem*. There was a verdict and judgment for the plaintiffs, and the defendant has appealed.

At the close of all the testimony in the case, the appellant challenged the sufficiency of the evidence and asked for a judgment in its favor upon three grounds: (1) that its negligence had not been shown; (2) that the deceased assumed the risk; and (3) that his death was caused by his own negligence. The application was denied.

The negligence relied upon for a recovery is alleged in paragraphs 4 and 5 of the complaint as follows:

"(4) That at a date prior to the 11th day of April, 1907, the deceased, G. K. Anustasakas was employed by the defendant as a laborer and on the 11th day of April, 1907, the said deceased G. K. Anustasakas was laboring under the orders and directions of the defendant and its foreman in an excavation at Third avenue and Madison street in the city of Seattle; that the said G. K. Anustasakas was ordered into the said excavation to labor and he trusted the defendant and its foreman to see that the same was kept safe and in proper condition; that the defendant failed to provide the said deceased G. K. Anustasakas with a safe place in which to work; that the defendant carelessly and negligently failed to provide any material for propping up and bracing the walls of the said excavation, and carelessly and negligently failed to properly brace and protect the said walls of the said excava-

tion and the said defendant and its foreman negligently and carelessly ordered the said G. K. Anustasakas to stay in the said excavation and labor, assuring him that the same was safe after one of said laborers had notified the foreman of the defendant in charge of the work that the said walls were unsafe and the walls should be protected to prevent the same from caving in.

"(5) That by reason of the carelessness and negligence of the defendant in failing to provide the proper material for bracing the said walls, and by reason of the negligence and carelessness of the defendant in failing to properly brace and protect the walls of the excavation, and by reason of the carelessness and negligence of the defendant in ordering and keeping the said deceased G. K. Anustasakas and his fellow laborers in the said excavation after the defendant was notified that it was unsafe, the said walls caved in and the said G. K. Anustasakas was covered by the earth and buried and crushed thereby and by reason of the said injuries so received died a few hours later."

The deceased was injured by the caving of the walls of a trench in which he was working, and death resulted in a few hours. The appellant was engaged at the time of the accident in laying a water main in the city of Seattle. The trench had been dug some ten days or two weeks before the accident occurred. The excavation where the deceased was injured was about three feet in width and seven or eight feet in depth. A few minutes before the injury, the foreman of the appellant directed the deceased to abandon the work he was doing and go into the trench and dig some "bell" holes, that is, holes under the pipe joints so that the joiner could connect the pipe. While in the trench, and from five to fifteen minutes after he had finished, the wall caved and a mass or block of earth struck the deceased with such force as to cause his death.

There are numerous assignments of error, and the discussion in the briefs has taken a wide range, but the material facts developed upon the trial made the issue a simple one. The respondents' testimony tends to show that it is usual and

customary to brace the walls of excavations of the depth of the one where the deceased was injured; that they were not braced, and that no material was furnished with which to brace them; that a few minutes before the accident a fellow servant of the deceased directed the attention of the appellant's foreman to a crack in the ground near the wall of the trench and opposite the place where the deceased was working; and that the foreman neither warned the deceased nor took any steps to protect him. The appellant met this state of facts with testimony tending to show that no such custom obtained; that the soil at the place of the injury was hard blue clay or hard pan, containing gravel; that the caving could not have been reasonably anticipated; and that the attention of the foreman was not directed to the crack. This made a simple issue which the jury resolved against the appellant, and the court properly denied its motion for a judgment.

It is, however, asserted that the deceased was an experienced man in that kind of work; that he assumed the risk arising from the master's failure to brace the walls; and that that issue should not have been submitted to the jury. This contention cannot be sustained. The question of the assumption of risk was one of mixed law and fact. It is true that the fact that the wall was not braced was open and apparent. The whole scope of the appellant's evidence, however, was directed to proving that it was not customary to brace the walls of excavations of this character, and that the nature of the soil was such that no one would have apprehended danger. The appellant directed the deceased where to work, and the direction carried with it an implied assurance that the place was safe. The deceased had a right to rely upon this assurance unless the dangers were open or apparent, or the character of the work was such that a reasonably prudent man would have apprehended danger. The point was ruled against the appellant in the former appeal, *Anustasakas v.*

*International Contract Co.*, 51 Wash. 119, 98 Pac. 93, 21 L. R. A. (N. S.) 267, where we said:

"We deem it unnecessary to discuss the facts further than to say that under the testimony the questions of negligence, contributory negligence, and assumption of risk, were so clearly for the jury that we are constrained to believe that the nonsuit must have been granted on other grounds."

That the question as to whether the deceased assumed the risk was one to be determined by the jury is supported by the following cases: *Johnson v. Collier*, 54 Wash. 478, 103 Pac. 818; *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498, 19 L. R. A. (N. S.) 367; *Howland v. Standard Milling & Logging Co.*, 50 Wash. 34, 96 Pac. 686; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191. The facts, in our opinion, are so clearly within the rules announced in the cases we have cited that it is unnecessary to inquire what the rule is in other jurisdictions.

The point is made that there is no evidence to support the averment that the foreman ordered the deceased to stay in the excavation, assuring him that the place was safe, after the former had notice that it was unsafe. As we have seen, there is evidence that the foreman directed the deceased to work at the place where he received the injury. The direction had the force of an order, and it contained an implied assurance that the place was safe. The direction carried with it the duty on the part of the deceased to "stay" until the work was completed. There was no variance in this respect between the allegations and the respondents' proof.

It is contended that the deceased remained in the trench a few minutes after the joiner had said to him that his work was completed, and that when his work in the trench had been finished the obligation of the master was at an end. The court instructed the jury that, if the deceased remained in the trench an unreasonable length of time after he had completed the work he was directed to do, the duty of the master to keep the place in a reasonably safe condition ceased, and

there could be no recovery. We think the instruction was as favorable to the appellant as the law would warrant. The fact was one for the jury to determine.

The court instructed:

"If any circumstance arises during the progress of the work which imperils the safety of the servant, and such circumstance becomes known to the master, or its foreman, and is unknown to its servant, it would be the duty of the master to immediately warn the servant of such danger, in order that the servant might protect himself. And in this case, if you find from the evidence that this place became dangerous and the danger became evident to the foreman in charge of the work, or his attention was called to it as the presence of the crack in the earth along the excavation in which the deceased was working, and the defendant or its foreman failed to warn the deceased of such dangerous condition, then the defendant company would be guilty of negligence in that particular, and if the deceased was injured as a result of the failure of the foreman to warn him of the impending danger, the plaintiffs in this case would be entitled to a verdict; unless you find from the other instructions which I give you that he is not entitled to a verdict."

The appellant excepts to this instruction, on the ground that it is not in harmony with the negligence charged in the complaint. The complaint does not in direct terms allege that the foreman knew there was a crack in the earth near the wall of the trench, but a cursory reading of the paragraphs quoted will disclose that the complaint alleges that the foreman, with knowledge that the walls were unsafe, directed the deceased to continue at his work. The difference is one of form rather than meaning or substance.

Numerous errors are assigned in the refusal of the court to give instructions requested by the appellant. The instructions requested were either statements of negative propositions, or renewals of the grounds stated in the challenge to the evidence.

Upon the question of negligence the court instructed, in substance, that the respondents must recover, if at all, upon

the acts of negligence charged in paragraphs 4 and 5 of the complaint; that negligence consists in the failure to use reasonable care; that the standard of reasonable care is the conduct of the average, prudent man; that the master must furnish a reasonably safe place for the servant to work in; that the master is not negligent when he performs the work in the same manner and uses the same appliances as reasonably prudent men engaged in like work use and apply; that if it is customary for reasonably prudent persons engaged in the same kind of work under similar circumstances to furnish material for bracing the walls in excavations of like character to that described in the complaint, and the appellant failed to do so, it was negligent in that particular; that if it was not customary so to do, the appellant was not negligent in that respect; that negligence is never presumed, but that it is incumbent upon the party charging another with negligence to prove it by the testimony in the case. On the question of contributory negligence, the court instructed that the appellant has charged that the deceased was negligent and that his negligence materially contributed to his death; that this, if established, is a complete defense to the action; that the law imposes upon the servant the duty of exercising reasonable care for his own protection; that if he fails to exercise that degree of care and his failure so to do materially contributes to his death, there could be no recovery; that reasonable care means that degree of care usually exercised by a reasonably prudent person similarly situated. On the question of assumed risk the court instructed that the deceased assumed all the open, apparent, and obvious risks incident to the work he was doing, and that if his death resulted from such risks there could be no recovery. The instructions were brief, to the point, and in our opinion correctly announced the law of the case.

There was no error in asking the witness upon cross-examination whether he had been paid for his testimony. If counsel had sought to show that the witness had been injured in the

trench with the deceased, and the appellant had settled with him for the injury, a serious question would be presented.

The judgment will be affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ., concur.

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[No. 8557. Department One. February 24, 1910.]

ETTA E. CARPENTER, *Respondent*, v. GEORGE BRACKETT, *Appellant*.[1]

HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCES—DIVISION—EVIDENCE—SUFFICIENCY. The evidence sustains findings that a husband and wife, on making a division of their property, pending a divorce, intended that the wife should be given title to certain community property, where it appears that the title thereto had been in a trustee, who, at the husband's request, had made a deed to the wife some months before the settlement, the husband retaining possession of the deed; that deeds of other property passed between the parties on making the division, at which time the husband handed the trustee's deed to the wife, and subsequently it was recorded at the husband's request; that subsequent to the division he pointed out the property as belonging to the wife and thereafter paid no taxes thereon, and stood by while she erected a house on one of the lots.

SAME—DEED OF TRUSTEE TO WIFE—EFFECT. Where a trustee held the title to community property, who, at the husband's request, executed a deed to the wife, the husband's community interest is not divested by his subsequent delivery of the deed to the wife with intent to invest her with a separate estate; since that could only be done by his deed.

DIVORCE—DISPOSITION OF PROPERTY. The court is without jurisdiction to make any disposition of real property of the parties not mentioned in divorce proceedings.

HUSBAND AND WIFE—SEPARATION—DIVISION OF PROPERTY—AFTER DIVORCE—EQUITY—JURISDICTION. Where the husband and wife made a division of their property pending a divorce, and the husband agreed and attempted to vest the wife with title to certain lots by delivering a previously executed trustee's deed, and surrendered possession to her and acquiesced in and acknowledged her ownership,

[1]Reported in 107 Pac. 359.

In a suit in equity in which the question of title is submitted, the court has jurisdiction, after divorce granted, to decree specific performance of the contract, by compelling the husband to deed the property to the wife.

Appeal from a judgment of the superior court for Snohomish county, Steiner, J., entered October 23, 1909, upon findings in favor of the plaintiff, in an action to quiet title. Modified.

*S. J. White*, for appellant.

*Guie & Guie*, for respondent.

Morris, J.—Respondent brought this action to quiet her title to three lots in Edmonds, alleging, that on June 2, 1905, the parties hereto, then husband and wife, agreed to live apart and made a division of their property interests; that, in pursuance of such agreement, appellant caused to be conveyed to respondent certain real property, including the three lots, as her sole and separate estate, and she conveyed certain other property to appellant as his sole and separate estate; that subsequently a divorce was decreed, in which decree her title to these three lots was confirmed; that the deed, having been made prior to the divorce decree, was presumably a community grant, and that her title being clouded by appellant's presumptive community interest, she prayed for a decree removing such cloud. The answer denied these facts, alleged the appellant to be the sole owner of the lots under the divorce decree, and asked to have the title decreed to be in him. The court made findings in favor of respondent, and from judgment entered thereon this appeal was taken.

The title to these three lots was, prior to February 25, 1905, in James M. Gephart, who it is admitted was only a trustee for the parties hereto. On that day he made a deed to the lots to respondent at appellant's request, and delivered the same to appellant who retained possession of the same until June 2 following. From this point on the evidence is in conflict. Having determined to end their marital infelicity,

husband and wife on that day went to Everett where an agreement was entered into reciting a division of the property "according to the various deeds this day executed and exchanged," respondent executing a deed to appellant of a piece of land called the homestead, and appellant executing a deed to respondent of a five-acre piece. Respondent then testifies that, at the same time and as a part of the agreement, appellant handed her the deed to these three lots, which Gephart had executed on February 25th. This appellant denies, and contends that the only real property discussed or affected at that time was the homestead and the five-acre piece, and that he never delivered the deed to the three lots to respondent, or to any other person, until he filed the same for record on February 7, 1906. The deed appears to have been in the possession of C. R. Crouch, attorney for respondent in the divorce proceeding, for some time prior to February 5, 1906; for on that day Crouch, upon the written request of respondent, delivered the deed to Gephart, and, as it was filed for record February 7 at the request of appellant, it is fair to assume it was by Gephart delivered to appellant. Crouch testifies, as does Carpenter, the present husband of respondent, that, subsequent to June 2, appellant pointed out these three lots to them as the property of respondent. It also appears that respondent subsequently sold one of the lots, and that upon another she has erected a dwelling, all of which was known to appellant. She also offered to prove that she had paid all subsequent taxes, but this offer was by the trial court rejected. It does, however, appear that appellant paid no taxes on these lots subsequent to June 2. We think, therefore, the lower court was justified in its findings of fact.

But assuming the facts to be as found, we cannot concur with the court that respondent was entitled to the relief prayed for. When the deed passed from Gephart to appellant, the community thereby became invested with the title, and it could only become divested of such title by a proper

conveyance. Conceding, as the court below found, that on June 2 it was the purpose and intention of appellant to convey these lots to respondent and invest her with the title as her separate estate, he could not do so by handing the deed over to her. The only way his interest in those lots could be vested in respondent was by deed from him to her. It could not be done by intention, purpose, or desire, however strongly he may have expressed himself. We have heretofore held that, while a title taken in the name of either spouse is presumptively community property, it is proper to rebut such presumption by evidence that the purchase price was the separate fund of the one in whom the title was taken, or by subsequent oral declarations and admissions of the separate character of the purchase, or by the act of the parties in the treatment of the land with reference to voluntary liens, or by the expressed intention of the spouses at the time of the conveyance, as in the cases of *Guye v. Plimpton*, 40 Wash. 234, 82 Pac. 596, and *Ballard v. Slyfield*, 47 Wash. 174, 91 Pac. 642. So that, if the deed from Gephart had been executed on June 2, in accordance with the agreement then made and as a part consideration therefor, there might be some ground for holding (although such a question not being before us, we do not wish to be understood as so holding), aided by the subsequent facts as found by the court, that the presumption had been overcome and the deed held to pass sole title to respondent.

The Gephart deed was, however, made the previous February, and no intention of its purpose and effect in June could alter, change, or characterize the title which vested by its then delivery to the community. There is no evidence showing any intention of making any property settlement in February in which that deed would play a part. It is probably true that the parties were then living unhappily together, and a divorce was contemplated, but it is not contended that any arrangements had then been made looking to an amicable adjustment of their property rights, nor is it shown that re-

spondent had any knowledge of the existence of this Gephart deed until June 2. We cannot, therefore, hold there is any relation between the deed of February 25 and the agreement of June 2. It would also appear from the evidence of both parties that the agreement of June 2 did not dispose of all their property rights, but that there is still other property, not mentioned in the agreement nor referred to in the divorce proceedings.

Neither did the divorce decree award this property to either party. Respondent was the plaintiff in that action, and in her complaint she mentions many descriptions of real property, but makes no mention of this property. These lots not being referred to in the divorce action, the court therein had no jurisdiction over them, and could make no decree affecting them. We regret, in view of the facts as found by the lower court, which we believe justified by the evidence, that we are constrained to hold that our statute requiring all conveyances of any interest in land to be by deed, the interest of appellant in the property in controversy could only be divested by deed, and did not pass by the delivery by him of the Gephart deed.

It does not follow, however, that the respondent is not entitled to relief as, under the facts shown and found, we have this situation: An agreement to convey so as to vest title in her as her separate estate; an attempt and intention to carry out this agreement by delivery of a deed previously executed, in which she is named as grantee; a surrender of possession to her, and a subsequent acquiescence in and recognition of her title. By the pleadings both parties submit the title to the decree of the court and ask for general equitable relief. So that respondent can here be awarded such equitable relief as the facts show her entitled to, and that is to have the agreement of June 2, made partially in consideration of a conveyance of this property to her and in consideration of which she in her turn conveyed to appellant, specifically enforced and a decree entered in her behalf.

The cause will therefore be remanded to the lower court with instructions to modify the decree so as to direct and order that appellant, within thirty days from the filing of the remittitur in the lower court, execute and deliver to respondent his deed to the lots in question, in which deed he shall divest himself of all right, title, interest, and estate in and to the lots in controversy. And if for any reason the appellant shall fail or neglect so to do, the decree shall provide for the appointment of a commissioner, who shall be duly authorized and commissioned to carry out the provisions of the decree. Neither party will be awarded costs in this court.

RUDKIN, C. J., FULLERTON, CHADWICK, and GOSE, JJ., concur.

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[No. 8525. Department Two. February 25, 1910.]

ANNA MORRIS, *Respondent*, v. AYLETT C. MORRIS, *Appellant*.[1]

DIVORCE—GROUNDS—CRUELTY—CHARGE OF UNCHASTITY. A divorce is warranted on the ground of cruelty and personal indignities rendering life burdensome, where the husband, in the presence of others and of grown children, continually charged his wife with unchastity and denied the authorship of his children.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered March 16, 1909, upon findings in favor of the plaintiff, in an action for divorce, after a trial on the merits before the court without a jury. Affirmed.

*W. J. Canton*, for appellant.

DUNBAR, J.—This is an action for divorce. The complaint alleged nonsupport and cruel treatment. The answer

[1]Reported in 107 Pac. 186.

denied these allegations, alleging conduct on the part of the plaintiff which was unwifely. Upon hearing the case, the court granted a decree of divorce to the plaintiff, awarding her the care and custody of the five minor children, and awarding to her the property which was left within the court's jurisdiction.

The respondent has not filed a brief in this cause. The appellant alleges error in not sustaining his demurrer to the complaint, and in granting decree upon the testimony adduced. We think unquestionably the complaint was sufficient, both as to the allegations of nonsupport and of cruel treatment. We are also satisfied, from an examination of the record, which is brief, that the court was justified in the findings which it made, and in the judgment rendered. The husband took all the available property, horses, cattle, and other personal effects, out of the jurisdiction of the court to Canada some two or three years before the commencement of this action, and himself stayed in that country most of the time, returning only at intervals for very brief periods of time. We will not discuss the testimony at length in that respect, but it is amply sufficient to show that this woman with five children was left without sufficient support.

We also think the decree can be justified on the ground, prescribed by the statute, of cruel treatment of either party by the other or personal indignities rendering life burdensome. It is true that no physical violence was offered to the wife, but one has the faintest conception of human nature who supposes that harsh and cruel treatment or personal indignities are confined to physical assaults. To a sensitive wife continual charges of unchastity, with a disavowal of the authorship of his own children, especially when made continuously in the presence of others and even in the presence of the children, one of whom was seventeen years old and another fifteen, would constitute a cruelty compared with which the most brutal physical assault would be a soothing balm. The soul weariness and hopelessness of the wife is

manifested in an answer to the question, "Do you remember Mr. Morris objecting and telling you that he did not like Mr. Coleman to come to the place?" when she said: "I don't remember having talked with him about it. I remember something of the kind. I had so much of that kind of thing that it would be hard for me to remember."

There is an attempt on the part of the appellant to show that this jealousy of the husband was justified by the conduct of the wife. But the attempt we think has signally failed. The husband was quick to make charges in his answer to her petition for divorce, but he failed to appear and testify in the cause, nor did any one testify for him. Nor does the cross-examination, which the appellant seems to rely upon, support in any measure his contention that the wife was unchaste or even imprudent.

The judgment was in all respects right, and will be affirmed.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

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[No. 8555. Department Two. February 25, 1910.]

L. M. NEWMAN, *Respondent*, v. E. H. WORTHEN *et al.*, *Appellants*.[1]

LANDLORD AND TENANT—UNLAWFUL DETAINER—NOTICE TO QUIT—SUFFICIENCY. A notice to quit under the unlawful detainer act, Rem. & Bal. Code, § 812, subdiv. 2, is not objectionable in that it purports to terminate the tenancy on the last day of the month rather than on the date the notice was given, to take effect at the end of the month.

SAME. A notice to quit a monthly tenancy expiring at the end of the month, may properly notify the tenant to vacate on the last day of the month instead of at the end of the month, where it was served twenty days prior thereto.

SAME—DEFENSES—TENDER OF RENT. Under a tenancy from month to month, tender of rent for the months of May and June before the

[1]Reported in 107 Pac. 188.

commencement of the action is no defense to the action of unlawful detainer upon proper notice terminating the tenancy at the end of the month of April.

SAME—DOUBLE DAMAGES. Rem. & Bal. Code, § 827, requires judgment to be entered in unlawful detainer of leased premises, for double the sum found as damages for the unlawful detention.

Appeal from a judgment of the superior court for King county, Clifford, J., entered September 14, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of forcible entry and detainer. Affirmed.

*Fred H. Lysons*, for appellants.

*Byers & Byers*, for respondent.

DUNBAR, J.—This is an action for forcible entry and detainer. The amended complaint alleged, the leasing of the premises by the respondent to the defendants, on a month to month tenancy at $75 a month, payable in advance; that notice to terminate the tenancy was given on April 10, 1909, and served on the defendants, and demand in writing to that effect; that the defendants failed, neglected, and refused to vacate said premises on April 30, 1909, and did not vacate the said premises until the expiration of June 30, 1909; alleging damages in the sum of $150. The answer denied generally the allegations of the complaint, but admitted the occupancy of the premises, and alleged tender by defendants to the plaintiff, before the commencement of this action, of the rent in full for the months of May and June. The cause proceeded to trial before the court without a jury, and at its conclusion the court found substantially the matters alleged in the complaint. From its findings of fact the court made its conclusions of law, as follows: That the plaintiff is entitled to a judgment against the defendants in the sum of double the amount of damages mentioned in the findings of fact; that is to say, in the sum of $300. From this judgment, this appeal is taken.

There are several assignments of error, but they all, with one exception perhaps, are involved in the question of whether the notice was sufficient to terminate the tenancy. Unlawful detainer is defined in Rem. & Bal. Code, § 812, subd. 2, as follows:

"When he [following other provisions], having leased real property for an indefinite time, with monthly or other periodic rent reserved continues in possession thereof, in person or by subtenant, after the end of any such month or period, in cases where the landlord, more than twenty days prior to the end of such month or period, shall have served notice (in manner in this act provided), requiring him to quit the premises at the expiration of such month or period."

The notice which was served in this case was as follows:

"NOTICE TO QUIT.

"To Worthen & Company, or occupants:

"Notice is hereby given and extended that you are hereby required to quit, surrender up and deliver to West & Wheeler, the possession and occupancy of those certain premises described as follows, to-wit: 318 E. Pike Street, Seattle, Washington, which you hold of me; and to remove therefrom and vacate said premises on or before the 30th day of April, A. D. 1909, pursuant to the statute in such case made and provided; and you are further notified that on said 30th day of April, A. D. 1909, the relation of landlord and tenant heretofore existing between the undersigned and yourselves will thereupon cease and terminate. You are further notified that, in case of your failure so to do, you will be guilty of unlawful detainer and liable to an action for such unlawful detainer. L. M. Newman, Owner,

"By West & Wheeler, Inc., Agents."

The first objection to this notice is, that it purports to terminate the tenancy and sever the relation of landlord and tenant on the 30th day of April, which is during the period of the tenancy; that the notice ought to have stated that it was terminated at the time the notice was given, such termination to take effect at the end of the month ending April 30. This criticism to our minds is highly hypercritical. If a strict, legal construction should be placed upon the manda-

tory provision of the statute to notify, the announcement which it is claimed by the appellants ought to have been made by the owner, that he terminated the lease, such termination to take effect at the end of the month, would amount to nothing; for the termination could not take effect under the provisions of the law before the end of the month, notwithstanding the announcement in the notice.

It is claimed by the appellants that the notice was defective in that it attempted to terminate the tenancy during the month of April; that is, on the 30th day, instead of at the expiration of the month, as the statute provides. It is conceded that it was served more than twenty days prior to the expiration of the month, and it seems to us that this concession carries with it the concession that it must have been served more than twenty days prior to the time fixed in the notice for the vacation of the premises. Under the strict construction contended for by the appellant, it is true it would not be subject to the action of forcible detainer until the last minute of the last day of April 30; but the same strict construction would prevent its occupancy of the premises on the first minute of the first day of the next month. So that it behooved it under the law to vacate the premises during the month of April. It is evident to our minds that a person of ordinary understanding would have no difficulty in determining from this notice that he was required to vacate the premises before the first day of May, and that, if he continued on the premises after that time, it was because he desired to do so in spite of the notice given by the owner.

Under the testimony there can be no question of the amount of the damages which the respondent was entitled to, and if our construction of the notice is correct, the tender pleaded by the appellants was of no effect. Neither can there be any question, under the provisions of the statute, in relation to the double damages. Rem. & Bal. Code, § 827, among other things, provides as follows:

"The jury, or the court if the proceedings be tried without a jury, shall also assess the damages occasioned to the

plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due."

It is also contended that the court erred in finding that, on April 10, 1909, the respondent caused to be served on the appellants the demand in writing above referred to. There is some conflict in the testimony on this proposition, but from an examination of the testimony we do not feel that we would be justified in interfering with the finding of the court in that regard.

The judgment will be affirmed.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

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[No. 8288. Department Two. February 25, 1910.]

ANNA PILCHER *et al.*, *Appellants*, v. GEORGE H. LOTZGESELL *et al.*, *Respondents*, HENRIETTA CYDELL *et al.*, *Defendants*.[1]

LIMITATION OF ACTIONS—RECOVERY OF REAL ESTATE—PARTITION—ACCOUNTING. An action for the partition of real property and an accounting, brought by children not named in their mother's will (which devised the property to her husband) is barred by the statute of limitations when not commenced until more than ten years after the husband deeded the lands and surrendered possession to the defendants.

TRUSTS—LACHES—STALE CLAIM. An action for an accounting and to enforce a trust, whereby plaintiffs' father was to hold for their benefit lands descended from their mother, is a stale claim and barred by laches, where the same was not commenced until seventeen years after the youngest plaintiff became of age and the father had died after making a different testamentary disposition of the property.

[1]Reported in 107 Pac. 340.

TRUSTS—EXPRESS TRUSTS—PAROL PROOF. Under Rem. & Bal. Code, § 8745, requiring conveyances to be by deed, an express trust in lands cannot be proved by parol testimony; and to give any standing in court, the trust must be *ex maleficio*.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered March 9, 1909, upon findings in favor of the defendants, dismissing an action for the partition of real and personal property and for an accounting, after a trial on the merits before the court. Affirmed.

*Morris, Southard & Shipley*, for appellants.

*A. W. Buddress*, for respondents.

DUNBAR, J.—The briefs in this case are exceedingly large and the record voluminous, but a perusal of the case convinces us that the material facts are few and simple. The complaint discloses that Gertrude Eliza and George Henry Lotzgesell were husband and wife, their heirs being the plaintiffs and defendants in this action, together with one son, John Lotzgesell, a bachelor, since deceased. The mother died March 6, 1889, having executed a will making the husband her sole heir, none of the children being mentioned in the will. The will was what is termed a nonintervention will, providing that the husband should take exclusive charge of the estate and be exempted from any order or action of the probate court except in so far as proving the will is concerned, and the will was probated by the husband in the probate court of Clallam county to that extent, the petition reciting that the real estate situated in Clallam county was community property of the petitioner and his deceased wife, Gertrude Eliza Lotzgesell. The property was taken into possession, or remained in possession, of the husband until March 26, 1897, when he conveyed different tracts of the real estate to different ones of the children, conveyance of certain lands being made to the appellants in this action, the children taking possession of these different tracts of land and assuming ownership over them.

At the time the will was executed by the mother, appellant Anna Pilcher was twenty-seven years old and appellant Lillie Alexander, then unmarried, was sixteen years old. The father died February 16, 1907, and just before his death he executed a will leaving a small amount to each one of his heirs, but leaving the bulk of the property to the defendants, who are executors of said will. The will provided that Mrs. Henrietta Cydell should have the use of the farm during the lifetime of George Lotzgesell, who evidently, from the record, was an incompetent of some character and who was to be to a certain extent maintained during his life by Mrs. Cydell, and upon the death of said George the property was to revert to the two defendants Frank Lotzgesell and George H. Lotzgesell. In a few months George Henry Lotzgesell died, and after his death this action was commenced by the appellants, Anna Pilcher and Lillie Alexander, claiming that the will of the mother was ineffectual as to them, they not having been mentioned in the same, and further that it was the understanding at the time the will was made that the property should be held in trust by the father for the benefit of the children. A prayer was made that a partition and division be made of all the real estate and personal property owned by Gertrude Eliza Lotzgesell in her lifetime and left by her at her death, among the several parties seized of or entitled thereto according to their respective estate and interest therein; but in case said real estate and premises could not be equitably divided among the respective owners thereof, that the said real estate and premises be adjudged and ordered to be sold and the proceeds appropriated according to the rights of the parties; that an accounting be had between the parties for the rents, profits, and uses of the property as their interest might appear, and for further relief within the conscience of the court. The answer, admitting many things set forth in the complaint, denied that there was any trusteeship in the father, or that he had made any promises in that direction to the mother upon her deathbed, as had been al-

leged in the complaint, and pleaded the statute of limitations. A reply was interposed, and the case went to trial before the court, with the result that the cause was dismissed, findings being made in favor of the defendants.

As to the land which was deeded to these defendants by their father on March 26, 1897, the record shows that the parties went into the possession of the land and have maintained possession ever since, paying the taxes and farming the land and appropriating the proceeds; and whatever view may be taken of other propositions argued in the case, it is too plain for argument that the statute of limitations has run against the plaintiffs so far as this deeded land is concerned, the deeds having been made March 26, 1897, and this action not having been commenced until June 11, 1908.

As to that portion of the estate which is not included in the property disposed of by deeds aforesaid, we think the court was abundantly justified in concluding that the plaintiffs had been guilty of laches in bringing this action, and that the claim was a stale one. As we have seen, nineteen years expired after the alleged execution of the trust before this action was commenced, the appellant Pilcher at that time being twenty-seven years old and the appellant Alexander being sixteen years old; so that seventeen years have expired since Lillie Alexander became of age and had a legal right to enforce her just claims.

Oral testimony was introduced to show that influence was brought to bear upon the mother during her last sickness to influence her to deed her property exclusively to the father, and that he had promised that, if she would do so, he would hold it in trust for all the children. An express trust cannot be proven, under the provisions of Rem. & Bal. Code, § 8745, by parol testimony, so that, if the parties have any standing here at all, it would be by reason of the fact that the trust was *ex maleficio*. But the court in this case has found that said George Henry Lotzgesell never at any time made any promise or agreement whatever, either verbally or in writing,

to or with the said Gertrude Eliza Lotzgesell, his wife, nor to or with any of the plaintiffs or defendants, concerning or in any wise affecting any of the premises mentioned in any of these findings, nor any of the real or personal property owned by him or in which he had any interest, other than the deeds and last will and testament set forth in the findings. There was testimony introduced tending to establish this fact, but the court evidently did not believe it. Nor are we impressed with its truthfulness, as a court must be, to set aside a plain conveyance and declare it to be held in trust for some one else. The will in this case, though inoperative as to the heirs not mentioned, was a regular instrument of conveyance on its face, and before it could be judicially determined that it was not what it purported to be, the strongest kind of proof must be adduced. In *Denny v. Holden*, 55 Wash. 22, 103 Pac. 1109, this court said:

"The appellant seeks to establish a resulting trust by parol evidence, to show that the respondents, the owners of the legal title to the property in controversy, hold title to the extent of an undivided one-half interest in trust for him. In such case the evidence must be clear, cogent, and convincing before a trust will be declared";

citing 3 Pomeroy's Equity Jur. (3d ed.), 1040, and cases.

In determining the quality of the evidence, the fact must not be lost sight of that the lips of the father in this case are closed in death, and courts will as a rule be slow to lend a willing ear to statements of what dead men said, especially when the statements attributed to them impeach their veracity and they are left helpless to defend their good names and to protect the interests which they have seen fit, as in this instance, to bequeath. Seventeen years is a long time for persons to postpone action in a case where their rights are in jeopardy.

The appellants cite the case of *Barnes v. Barker*, 5 Wash. 390, 31 Pac. 976, in support of the contention that the appellants have a right to bring this form of action. But that

case rather establishes the fact that the appellants in this action were guilty of laches than otherwise, the court there saying:

"Such being the fact what was her remedy? In our opinion it was simply to move the court to proceed with the administration of the estate of her mother, and as a part of such administration to decree and set over to her the proportion to which she would have been entitled if her mother had died intestate."

Whether an heir would be compelled to do this, the case implied that prompt action was demanded. But in this case seventeen years have expired, during which time recollection of events and conversations must necessarily be dimmed. The father in the meantime has died, and it is not until after he has made a will and passed away—a will which evidently is not satisfactory to some of the heirs—that this claim of trusteeship *ex maleficio* is made. This case, it seems to us, falls squarely in principle within the rule announced by this court in *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306. There, it is true, that twenty years had expired after the deed was made before an assault was made upon it, but in the meantime Mrs. Spaulding had remained upon the land which had been deeded to Collins, and had raised objections at different times to the sale of the same, claiming that the deed was intended as a mortgage. But she had never paid any rent for the use of the property and was simply tolerated upon it; and we held that, notwithstanding this tolerated possession by Mrs. Spaulding, she had stood by too long at that time to set up the claim that the deed was intended as a mortgage.

From all the testimony in this case, we are satisfied that an injustice would be done to allow the provisions of this will and of these deeds to be in any manner disturbed. The judgment is therefore affirmed.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8552. Department Two. February 25, 1910.]

# GEORGE M. HORTON, *Guardian etc., Respondent*, v. R. W. BARTO *et al., Appellants*, and LORENZO FICKERT *et al., Defendants*.[1]

EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—JURISDICTION—PROCESS—INFANTS—SERVICE ON GUARDIAN. A decree of distribution of an estate cannot affect the interests of a minor unless jurisdiction over him be acquired by service of notice upon his general guardian, if he have one, and if not, then by the appointment of a guardian *ad litem*.

SAME—JURISDICTION OVER HEIRS. Upon the distribution of an estate it is necessary to acquire jurisdiction over heirs or devisees of the deceased, or their descendants who died subsequently to the death of the deceased.

SAME—DISTRIBUTION—BONA FIDE PURCHASERS—INTERESTS NOT OF RECORD. A distributee upon final settlement of an estate, and his successors in interest, are not *bona fide* purchasers by reason of the fact that they had no notice of the interests of an heir which was not in the record chain of title; but they are bound to notice the interests of all who successively acquire title by inheritance or will.

SAME—RECORDS—FAILURE TO RECORD WILL. Failure to record a will, under Rem. & Bal. Code, § 1306, requiring a copy of a will to be recorded in the county auditor's office of each county in which lands devised are located, does not relieve a purchaser of taking notice of the interests of devisees where the will was probated in the county in which the land is located.

WILLS—EXECUTION—PROBATE—COLLATERAL ATTACK. Probate of a will in common form cannot be collaterally attacked or set aside after the time limited therefor by law because of the fact that the will appears on its face not to have been executed in the manner required by law.

SAME—STATUTES. Under Rem. & Bal. Code, § 1307, providing for the contest of the probate of a will, within one year, on the question of the competency of the deceased, or respecting its execution, restraint, undue influence, "or any other cause affecting the validity" of the will, and § 1309, providing that the probate shall be binding if no person shall appear within the year, all contests based upon any cause affecting the validity of the will must be commenced within the time limited, after which the probate is binding upon all except persons under disability.

[1]Reported in 107 Pac. 191.

PARTITION — BY PAROL — EVIDENCE—SUFFICIENCY. Evidence that two heirs contemplated dividing property left by their mother is insufficient to show a parol partition between them.

APPEAL—REVIEW—SCOPE OF REVIEW. Upon an appeal from a decree merely determining the title to land in controversy, the supreme court will not consider questions that may arise upon a partition of the land.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 26, 1909, in favor of the plaintiff, after a trial before the court without a jury, in an action for partition and to quiet title. Affirmed.

*Blaine, Tucker & Hyland*, for appellants.

*S. D. King* and *Todd, Wilson & Thorgrimson*, for respondent.

PARKER, J.—By this suit the plaintiff seeks to have his ward, Edward Collins, adjudged the owner of an undivided one-fourth interest in certain lands in King county, and also, to have the same partitioned. Upon the trial it was agreed between counsel for all parties that the cause should be first tried upon the question of the title of the respective parties to the lands involved, and that partition proceedings should await a final determination of the cause upon the question of title. The trial of the cause before the court upon the question of title resulted in a decree favorable to plaintiff. The defendants Barto and wife have appealed.

In 1876 Dinah Sour died intestate, in King county. She was then the owner of the lands here in controversy, the same being her separate property. This is the common source of title of all the parties to this suit. She left surviving her, as her only heirs at law, her two children, Stephen Collins and Lucinda Gordon, each of whom took by inheritance an undivided one-half of the property left by their mother. In 1882 Stephen Collins died intestate, leaving as his only heirs at law his widow Annie (or Anna), and their son William H. Collins, each of whom took by inheritance an undivided one-

half of the property left by Stephen Collins. This resulted in Annie Collins becoming the owner of an undivided one-fourth of all the property left by Dinah Sour, the mother of her husband, unless her husband had theretofore been divested of title to certain portions thereof, including the lands here involved, by an alleged parol partition which we will notice later.

On June 15, 1886, Annie Collins gave birth to another son, who was then named Edward Sweeney Collins. He also appears to have been known as Ned S. Clalendon (or Clendon), but has generally been known as Ned S. Collins. There is, however, no question as to his identity. He is the ward in whose behalf this suit was instituted. In May, 1894, Annie Collins died, leaving as her only heirs at law her two sons, William H. Collins and Edward Collins. She had not disposed of any of her interest in the property left her by her husband. She left a will by which she devised unto her son William H. Collins the sum of five dollars, and devised unto her son Ned S. Collins (Edward Collins), the residue of her estate; and provided for the settlement of her estate by her executor without intervention of the superior court, except to admit her will to probate. It is not suggested here that the five-dollar bequest to William H. Collins is now a charge upon the land involved. The will was duly admitted to probate in the superior court for King county on June 8, 1894. No further court proceedings were had in the administration of the estate of Annie Collins.

In 1891 letters of administration were granted by the superior court for King county upon the estate of Dinah Sour, who had died in 1876. On June 14, 1899, the superior court for King county rendered a final decree of distribution in the matter of the estate of Dinah Sour. This, it will be noticed, was long after the death of Stephen Collins, her son, and long after the death of Annie Collins, his wife, and also long before Edward Collins, the second son of Annie Collins, became of age, he being then only thirteen years old. This

decree purported to distribute the whole of the estate of Dinah Sour to William H. Collins, son of Stephen and Annie Collins, both deceased, and James Fares, adopted son of Lucinda Gordon, deceased. It was rendered, evidently, upon the theory that the court had jurisdiction to determine who were entitled to the property as heirs of the deceased heirs of Dinah Sour, the heirs of Dinah Sour (William H. Collins and Lucinda Gordon) having died after the death of Dinah Sour and before distribution. While this decree recites that due notice was given of the hearing as required by law, it is conceded that, at the time of the distribution, Edward Collins had no general guardian, and that no guardian was appointed to appear for him to take care of his interest upon that hearing. Barto and wife claim title as successors in interest of James Fares and William H. Collins.

It is contended by learned counsel for appellants that the decree of distribution in the estate of Dinah Sour is a final determination of who were entitled to the property left by her, and that Edward Collins is bound by that decree. Passing the question of the power of the court in that proceeding to determine any person's rights, other than the rights of the heirs of Dinah Sour (Stephen Collins and Lucinda Gordon), in view of the fact it was her estate that was being administered and distributed and not the estate of her deceased heirs, let us inquire as to whether or not the court had jurisdiction over the minor, Edward Collins. The matter of acquiring jurisdiction upon distribution of an estate of deceased persons is provided for by § 1589 of Remington & Ballinger's Code as follows:

"The decree may be made on the application of the executor or administrator, or of any person interested in the estate, and shall only be made after notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator. The court may order such further notice to be given as it may deem proper."

Turning to the sections relating to the manner of acquiring jurisdiction, upon an application to sell real estate, we find

the following: Section 1499 provides that, upon the filing of the application, the court shall, "make an order directing all persons interested to appear at a time and place specified, . . . to show cause why an order shall not be granted, . . . to sell . . . ." etc.

Section 1500 provides:

"A copy of such order to show cause shall be personally served on all persons interested in the estate at least ten days before the time appointed for the hearing of the petition, or shall be published at least four successive weeks in such newspaper as the court shall order . . . ."

Section 1502 provides:

"If any of the devisees or heirs of the deceased are minors, and have a general guardian in the county, the copy of the order shall be served on the guardian. If they have no such guardian, the court shall, before proceeding to act on the petition, appoint some disinterested person their guardian for the sole purpose of appearing for them, and taking care of their interests in the proceedings."

In the case of *Ball v. Clothier*, 34 Wash. 299, 310, 75 Pac. 1099, this court held that the superior court was without jurisdiction to order a sale so as to divest a minor of his interest in the land, unless jurisdiction over the minor was acquired as provided by § 1502. These statutory provisions, and the construction placed upon them, render it plain that the interest of a minor cannot be affected by a decree of distribution unless jurisdiction over the minor has been acquired by service upon his general guardian, or if he has no such guardian, then by the appointment of a guardian to take care of his interests in the proceeding. We have seen that Edward Collins had no general guardian, nor was any guardian appointed to represent him at the time of rendering of the decree of distribution of the estate of Dinah Sour. In view of the fact that Edward Collins did not inherit from Dinah Sour, was it necessary that the court acquire jurisdiction over him in the manner provided by these sections

of the statute? We think it was. Assuming that the court had jurisdiction over the estate of Dinah Sour, and that the decree was rendered upon due publication of an order to show cause, it no doubt would have become final as to Stephen Collins, the son and heir of Dinah Sour, he being of full age, had he then been alive. *In re Ostlund's Estate, ante* p. 359, 106 Pac. 1116. However, upon distribution it is as necessary to acquire jurisdiction over an heir or devisee of a deceased heir or devisee of the person whose estate is being distributed, as it is over such deceased heir or devisee if he were alive. Of course we have reference only to deceased heirs or devisees who die after the death of the person whose estate is being distributed. 18 Cyc. 646; 2 Woerner, American Law of Administration (2d ed.), § 561; *Distributees of Hall v. Andrews, Adm'r*, 17 Ala. 40; *Morris v. Virden*, 57 Ark. 232, 21 S. W. 223.

Upon the same principle we think it was necessary to acquire jurisdiction over the minor Edward Collins, who took title as an heir and devisee of his mother Annie Collins, deceased, who took title as the widow of Stephen Collins, deceased, who took title as an heir of his mother Dinah Sour, deceased, whose estate was attempted to be distributed. We are of the opinion that the decree was not a conclusive adjudication upon the rights of Edward Collins. We do not want to be understood as expressing any opinion upon the power of the superior court, in decreeing distribution of an estate of a deceased person, to determine the respective rights of heirs or devisees, among themselves, of deceased heirs or devisees of a deceased person whose estate is being distributed. The fact that the court in no event had jurisdiction over Edward Collins is sufficient ground for our holding that this decree of distribution is not conclusive upon his rights. He was entitled to be heard upon the question of the interest inherited by Stephen Collins, his mother's deceased husband, from Dinah Sour. And if the court had jurisdiction, as it assumed to have, in the distribution of Dinah Sour's estate,

over the devolution of this property beyond the determination of who her heirs were and the determination of what their respective interests were at the time of her death, then Edward Collins had a right to be heard upon the question of his mother's rights as the widow and successor in interest of her deceased husband, Stephen Collins, and also upon the question of his own right as an heir and devisee of his deceased mother.

Appellants claim to be purchasers of the land for full value and without notice of the rights of Edward Collins. Their counsel contend that the interest of Edward Collins is not within the record chain of title, and therefore appellants were not required to take notice of his interest. It is argued, in substance, that since the name of Edward Collins does not appear in some instrument on record in the auditor's office, indicating his interest in the land, purchasers are therefore not required to take notice of such interest. The case of *Attebery v. O'Neil*, 42 Wash. 487, 85 Pac. 270, is cited by counsel in support of this contention. In that case, prior to the death of the wife, the husband had acquired an equitable interest in land which presumably belonged to the community. The legal title to the land was conveyed to the husband after the death of the wife. This was the first record evidence of the husband's title, there being nothing of record showing the equitable interest acquired before the wife's death. It was held in that case that a subsequent mortgagee, who had become such in good faith by a mortgage executed to him upon the land by the husband and his second wife, was not bound to take notice of the possible interest of the heirs of the first wife. This was but the application of the general rule recognized by this court in the case of *Sengfelder v. Hill*, 21 Wash. 371, 384, 58 Pac. 250, to the effect that an equitable title of which a purchaser had no notice will not be allowed to prevail over a legal title purchased by him in good faith. The title of Edward Collins in this land is not merely equitable but purely legal. And while his name does not appear

in the recorded chain of title in the auditor's office, that of Dinah Sour, the source from which he acquired his title by inheritance and will, does appear in the record chain of title. We think it is elementary that the interests of all who successively acquire title by inheritance or will from a deceased record owner must be noticed by purchasers of the land. The legal title to their respective interests in this land was acquired by Stephen Collins, Annie Collins, and Edward Collins in succession, each immediately upon the death of his or her respective predecessor in interest. Rem. & Bal. Code, § 1366; *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765; *Anrud v. Scandinavian-American Bank*, 27 Wash. 16, 67 Pac. 364.

Our attention is called to several sections of the recording statutes. We need notice only § 1306 of Remington & Ballinger's Code, which provides:

"In all cases where lands devised by last will are situated in different counties, a copy of such will shall be recorded in the county auditor's office in each county within six months after probate."

There does not appear to be any provision of our laws declaring the effect of a failure to so record the will, upon the interest of a devisee named therein. Whatever the purpose of this recording provision may be, we are of the opinion that the failure to so record the will does not relieve a purchaser from taking notice of the interest of a minor devisee named therein, when the will has been duly probated in the superior court of the county in which the land is situated, assuming, of course, that the testator's title is of such nature that a purchaser would be required to notice it.

It is contended that the will of Annie Collins is void because of a failure to comply in its execution with § 1321 of Remington & Ballinger's Code, which provides:

"Every person who shall sign the testator's or testatrix's name to any will by his or her direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request."

It is argued that the will upon its face bears evidence of having the name of the testator subscribed thereto by some person other than herself, and hence there should have been indorsed thereon a statement by the person so subscribing the testator's name, as provided by this section. We regard this contention as presenting only a question which was before the court upon the probating of the will, and which might have been again presented to the court within the year allowed for contesting the will. Rem. & Bal. Code, § 1307. The probating of a will is a judicial act, and as such it cannot be avoided or set aside save in the manner provided by law. 1 Woerner, American Law of Administration (2d ed.), § 227; 23 Am. & Eng. Ency. Law (2d ed.), 132; Note in 21 L. R. A. 682 (*Sly v. Hunt*, 159 Mass. 151, 34 N. E. 187, 38 Am. St. 403); 1 Ross, Probate Law & Practice, § 192; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118. And this is true even though the probate be in common form as it is under our law. *London v. Wilmington etc. R. Co.*, 88 N. C. 584; *Petty v. Ducker*, 51 Ark. 281, 11 S. W. 2. Apparently the only difference between the finality of probate in solemn form and probate in common form is as to the time when the probate becomes conclusive. Probate in solemn form becomes conclusive upon rendering the decree to that effect, because it is upon notice to all who are interested. Probate in common form becomes equally conclusive upon the expiration of the time fixed by the statute for contesting the will after its probate, except as to certain persons under disability. The sections of Remington & Ballinger's Code providing for such contest and limiting the time within which it may be commenced, are the following:

"Section 1307. If any person interested in any will shall appear within one year after the probate or rejection thereof, and, by petition to the superior court having jurisdiction, contests the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issue shall be made up, tried and deter-

mined in said court respecting the competency of the deceased to make last will and testament, or respecting the execution by the deceased of such last will and testament under restraint or undue influence or fraudulent representation, or for any other cause affecting the validity of such will."

"Section 1309. If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, save to infants, married women, persons absent from the United States, or of unsound mind, a period of one year after their respective disabilities are removed."

It is contended that the concluding words of § 1307, "or for any other cause affecting the validity of such will," under the rule of *ejusdem generis*, are limited to causes of contest similar in kind to those specifically enumerated in the section, and do not include such defect as is here relied upon to avoid this will; and it is argued that such cause for avoiding the will is not within the one-year limitation. We are of the opinion, however, that in view of the language of § 1309, and the fact that we have no provision for the contest of will other than § 1307, the law is that all contests based upon any cause affecting the validity of the will must be commenced within one year after probate, and if not so commenced the probate becomes a final adjudication as to the validity of the will, binding upon the whole world, save as to the persons under disability mentioned in § 1309. This will having been duly probated and remaining uncontested for over fifteen years, its validity is now beyond question, save as the right of contest may exist in persons under disability.

It is contended that there was a voluntary parol partition of the property left by Dinah Sour, between her children, Stephen Collins and Lucinda Gordon, prior to the death of Stephen Collins in 1882, by which he parted with his interest in the land here involved. There is some evidence in the record tending to show that they contemplated dividing the land left by their mother, but it is wholly insufficient to support the conclusion that such partition was ever consum-

mated. Besides, it is evident the successors in interest of Stephen Collins and Lucinda Gordon have never relied upon any such partition, which is alleged to have been made nearly thirty years ago.

Appellants make some contention against the right of plaintiff to partition because of the latter's alleged failure to bring into the cause all of the common property. The questions which may arise upon the partition are not before us. So far as this appeal is concerned it is only from a decree determining the question of the title of the respective parties. Other contentions of appellants are without merit, and are not such as require discussion.

We find no error in the record. The judgment of the superior court is affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

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[No. 8570. Department Two. February 25, 1910.]

J. H. MORRISEY, *Appellant*, v. OTTO STROM, *Respondent*.[1]

SPECIFIC PERFORMANCE—DEFENDANT'S OWNERSHIP OF LAND—PLEADINGS. A complaint in an action to enforce the specific performance of a contract to convey land must allege that the defendant was the owner of the property either at the time the contract was made or at the time of the commencement of the action.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered August 17, 1909, upon sustaining a demurrer to the complaint, dismissing an action for specific performance. Affirmed.

*A. C. Shaw*, for appellant.

*Lovell & Davis*, for respondent.

RUDKIN, C. J.—This was an action to enforce the specific performance of a contract to convey real property. The

[1]Reported in 107 Pac. 191.

court sustained a demurrer to the complaint, and the plaintiff electing to stand on his pleading and refusing to plead further, a judgment of dismissal was entered, from which this appeal is prosecuted. The failure of the complaint to allege that the respondent was the owner of the real property at the date of the agreement to convey or at the time of the commencement of the action is the particular ground upon which the demurrer was sustained.

We have but little sympathy with appeals of this character. If the respondent was not in fact the owner of the property and could not perform his contract, the appellant had no right of action for specific performance. *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614. If, on the other hand, the respondent had title and was able to perform his contract, it was an easy matter to obviate the ruling of the court by amendment, whether the ruling was right or wrong. However, the appellant had a legal right to stand on his complaint, and if the complaint states a cause of action, the judgment must be reversed. Decisions on the question thus presented are few in number, for the reason, doubtless, that complaints in such actions almost invariably contain an allegation of ownership in the defendant, either at the time of the execution of the agreement to convey or at the time of the commencement of the action. In vol. 20 of the Ency. of Plead. & Prac., at page 451, the rule is thus stated:

"A bill to enforce the specific performance of a contract to sell to the complainant must aver the defendant's ownership of the property at the time when the contract was made."

This rule seems to be sustained by the authorities cited. See, also, *Manton v. Ray*, 18 R. I. 672, 29 Atl. 998, 49 Am. St. 811. Our own decisions assume that such an allegation is necessary. *Hankle v. Denison*, 34 Wash. 51, 74 Pac. 822; *Newell v. Lamping*, 45 Wash. 304, 88 Pac. 195.

The judgment of the court below is therefore affirmed.

PARKER, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8513. Department Two. February 25, 1910.]

# THE STATE OF WASHINGTON, *Respondent*, v. M. W. POYNER, *Appellant*.[1]

LEWDNESS — EVIDENCE — REPUTATION OF PARAMOUR—WITNESSES—FORM OF QUESTION. In a prosecution for lewdness, a question as to the "reputation" for chastity of the defendant's paramour, means when unqualified, *ex vi termini*, "general reputation," and is not objectionable in form.

SAME—ADMISSIBILITY. In a prosecution for lewdness, the general reputation of the defendant's paramour is relevant and material.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. Error in overruling objections to improper questions calling for the witness' suspicions and beliefs is not prejudicial when the answers elicited merely related to competent and relevant facts and circumstances.

LEWDNESS—OFFENSE—NOTORIETY—STATUTES—CONSTRUCTION. Under the statutory offense of lewdness, Rem. & Bal. Code, § 2901, for a man and woman, not being married to each other, to lewdly and viciously associate and cohabit together, it is not necessary that the acts be open and notorious or that the parties should hold themselves out as husband and wife.

CRIMINAL LAW—REVIEW—RECORD—QUESTIONS PRESENTED—MISCONDUCT OF COUNSEL. An objection to a certain statement of counsel to the jury will not be considered on appeal where the record fails to show any such statement as claimed in the objection.

CRIMINAL LAW—FORMER JEOPARDY—APPEAL FROM JUSTICE—SUBSEQUENT INFORMATION. Upon appeal after a trial on a complaint before a justice of the peace, the filing of an information in the superior court does not work a dismissal of the complaint or constitute a bar to the prosecution.

APPEAL—REVIEW—TRIAL—INSTRUCTIONS. It is not prejudicial to preface an instruction to the jury by the statement that it was given at the request of the appellant.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered August 4, 1909, upon a trial and conviction of the crime of unlawful cohabitation. Affirmed.

[1]Reported in 107 Pac. 181.

*Pruyn, Streff & Hoeffler*, for appellant.

*E. K. Brown*, for respondent.

RUDKIN, C. J.—The defendant was convicted of the crime of lewdly and viciously associating and cohabiting with a woman not his wife, and prosecutes this appeal from the final judgment of the court. The first error assigned is based on the admission of testimony tending to show the reputation for chastity of the woman with whom the appellant is alleged to have associated and cohabited, in the community in which she resided. The form of the question was: "Do you know the reputation for chastity, in Cle Elum, of Minnie Black?" The objection to this question is two-fold; first, because the inquiry was not limited to her general reputation; and second, because evidence as to her reputation was irrelevant and incompetent. *State v. Clark*, 9 Ore. 466, is cited in support of the objection to the form of the question. The decision in that case sustains the contention of the appellant, but the case itself was controlled by the doctrine of *stare decisis* by reason of an earlier decision in the same court. In the course of his opinion, Lord, C. J., said:

"Mr. Greenleaf says that the impeaching witness 'must be able to state what is generally said of the person by those among whom he dwells, or with whom he is chiefly conversant, for it is this that constitutes his general reputation or character.' (1 Greenleaf's Evidence, 577.)

"According to this statement of the text, it is the opinion generally entertained of a person in the neighborhood in which he resides that constitutes his general reputation or character. Now, the objection here is to the form of the question, in that it does not ask for the *general* reputation for chastity. If the question as put would elicit an answer for less than general reputation, it is bad beyond doubt.

"But may it not be argued, that when the question is asked the witness: 'If he knew what her reputation for chastity was in the neighborhood where she resided?' that reputation is here used, not in a limited but in an unqualified sense, and means *general* reputation, and that the question would be commonly so understood. When it is said of a person that

he has a good or bad reputation, it is only meant to convey the opinion generally entertained of such person.

"Reputation being then what is generally said of a person in his community, does not the question as above suggested, inquire and call for an answer which will reflect what is generally said of such person, and is this not the general reputation? It is true this argument admits that the inquiry must be directed to her general reputation for chastity, but it claims that the form of the inquiry is immaterial, provided by its terms it calls for the general reputation, and is not objectionable in other respects.

" 'Any question,' says Judge Thurman, 'not leading, that asks for the general reputation of the witness for truth is sufficient; and if the word reputation, when unqualified, does *ex vi termini*, or in common parlance, mean general reputation, as we think it does, it is unnecessary to prefix the word *general*.' (*French v. Millard*, 2 Ohio St. 50)."

The reasons assigned by the Oregon and Ohio courts are controlling here. The woman's reputation in Cle Elum consisted of what was generally said of her by those among whom she lived, and in the language of Judge Thurman, the term reputation, when unqualified, *ex vi termini* and in common parlance, means general reputation.

The second ground of the objection is also untenable. In prosecutions for adultery and kindred offenses the general reputation for chastity of the woman with whom the defendant is alleged to have consorted is relevant and material. *Blackman v. State*, 36 Ala. 295; *Commonwealth v. Gray*, 129 Mass. 474, 37 Am. Rep. 378; *State v. Berry*, 24 Mo. App. 466; Bishop, Statutory Crimes, § 679.

The next assignment is based on the ruling of the court permitting one of the witnesses for the state to answer the following questions: "Have you any suspicions?" "If so, relate them to the jury." "Tell the jury how you believed that." "What the circumstances were." "State the circumstances." Some of these interrogatories are highly objectionable, but when we turn to the answers to the questions we find them both relevant and competent. The witness did not

undertake to give his suspicions or beliefs, but merely related facts and circumstances within his knowledge. Indeed, the objection is confined to the questions themselves and does not extend to the testimony elicited. The ruling of the court was therefore not prejudicial.

Insufficiency of the evidence to sustain the verdict and judgment is the next error assigned. So far as material to the present inquiry, Rem. & Bal. Code, § 2901 defines the crime charged against the appellant as follows:

"If any man or woman, not being married to each other, lewdly and viciously associate and cohabit together, . . . every such person shall be punished by imprisonment," etc.

This statute is much broader than the common law offense of lewdness, and, while there must be a living together as if the conjugal relation existed, and the illicit intercourse must be habitual not merely occasional, it is not necessary that the acts should be open and notorious, or that the parties should hold themselves out to the public as husband and wife. *State v. West*, 84 Mo. 440; *State v. Coffee*, 39 Mo. App. 56; *Commonwealth v. Lambert*, 12 Allen 177; 29 Cyc. 210. "The statute includes illegal sexual intercourse, and the irregular indulgences of lust whether public or private." *Commonwealth v. Lambert, supra.* The testimony was largely circumstantial, as is usual in such cases, and no good will result from a review of it here. Suffice it to say, the jury was fully warranted in finding that the parties named in the information associated and cohabited together for a period of about six months, and that such association and cohabitation was lewd and vicious.

Error is assigned on a statement made by the prosecuting attorney in his argument to the jury, but the only reference to such statement in the record is found in the following objection, interposed by counsel for appellant, at the close of the testimony: "I wish to object to the statement by the prosecutor that the very fact that this case must go to the jury is a guarantee of the legal sufficiency of the evidence

to convict this man." The record does not show that any such statement was made by the prosecutor, or that the court's attention was otherwise directed to it if made. There is, therefore, no ruling of the court before us for review.

The appellant was first tried on a complaint before a justice of the peace, and upon his appeal to the superior court after conviction, an information was filed in lieu of the complaint. Upon this state of facts the appellant contends that the filing of the information worked a dismissal of the complaint and constituted a bar to further prosecution. This contention is without merit. *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132.

The court prefaced one of its instructions to the jury with the remark: "As requested by the defendant, I instruct you," etc., and this is assigned as error. The charge of the court was the law of the case for the guidance of the jury, and whether the instructions were requested by the state or the accused, or given by the court of its own motion, would seem utterly immaterial. An instruction given at the instance of the accused is as much the law of the case and is as binding on the jury as any other instruction, and, in the nature of things, a reference to the party by whom the instruction was requested could be neither harmful nor prejudicial.

This disposes of all questions presented, and finding no error in the record, the judgment is affirmed.

PARKER, MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8429. Department One. February 26, 1910.]

# I. N. HUFFMAN, *Respondent*, v. OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*.[1]

RAILROADS—FENCES—CROSSINGS—STATUTES—IMPLIED REPEAL. The railroad fence act of 1893, Rem. & Bal. Code, § 8729, requiring railroads, where the same person owns land on both sides of the track, to put in and maintain necessary crossings and gates, was impliedly repealed by the acts of 1903 and 1907, covering the same subject, Rem. & Bal. Code, § 8730, which provided that the owner shall have the right to put in gates for his use at such places as may be convenient.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered February 10, 1909, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to recover a penalty. Reversed.

*W. W. Cotton, Samuel R. Stern*, and *W. A. Robbins*, for appellant.

*P. C. Shine*, for respondent.

RUDKIN, C. J.—The complaint in this action alleges:

"(1) That the plaintiff is now and ever since the 20th day of April, 1889, has been the owner, under patent from the United States, of the following described lands, situate in the county of Spokane, state of Washington, to wit: The East half of the Northeast Quarter of Section 34, Township 22 North, Range 44 E. W. M., and that said lands are and were at all times hereinafter mentioned occupied, enclosed and cultivated by the plaintiff.

"(2) That the defendant, The Oregon Railroad & Navigation Company, is a corporation organized and existing under and by virtue of the laws of the state of Oregon, and is the owner of, and engaged in the operation of a line of railroad running through and across said lands, which said line of railroad and the tracks thereof are now, and were on the date hereinafter mentioned, fenced and enclosed throughout the entire length thereof.

[1]Reported in 107 Pac. 362.

"(3) That in order to give the plaintiff, together with his stock, access to the several parts of said lands, it is necessary that the defendant should put in place, and maintain upon said lands, at least two crossings over said railroad tracks, with the necessary gates and bars.

"(4) That prior to the commencement of the action, and on or about the 13th day of June, 1906, the plaintiff served upon the defendant a written notice, requiring defendant to provide said crossings and said gates and bars, but that the defendant failed and refused to comply with said notice, and still fails and refuses so to do.

"(5) That by reason of the premises, the defendant has become indebted to the plaintiff in the sum of two hundred fifty ($250.00) dollars by virtue of the provisions of section 7808 of Pierce's Washington Code, and Chapter 88 of the Session Laws of 1907.

"Wherefore plaintiff demands judgment against the defendant for the sum of $250, and for costs of suit."

To this complaint the defendant interposed a demurrer, on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant electing to stand on its demurrer and refusing to plead further, judgment was given in favor of the plaintiff according to the prayer of his complaint, from which the defendant has appealed.

The action was prosecuted under § 2 of the act of March 15, 1893, Laws 1893, p. 418, entitled, "An act to protect the owners of stock from injury thereto by moving railway trains, declaring the law of negligence and providing for a reasonable attorney's fee in all actions for such injury." This act contains four sections. Section 1 provides that in all actions against persons or corporations owning or operating steam railroads to recover for injuries to stock, proof that the track was unfenced shall be *prima facie* evidence of negligence. Section 2 provides as follows:

"When any person or corporation, owning or operating a railroad, shall fence the railroad track through the occupied or enclosed or cultivated lands of any individual or corporation it shall be the duty of said person or corporation, at

their expense, to put in place and maintain such crossings with gates or bars as may be necessary to give the owner, together with his stock, access to the several parts of his occupied or enclosed and cultivated lands. Persons holding or occupying land under any of the land laws of the United States, or by contract of purchase from any land grant railroad or under equitable title of any kind which gives them the right of occupancy, shall be considered as the owners of the land so held and occupied for the purposes of this act. Failure to provide such crossings with gates or bars for sixty days after written notice from the owners requiring the same, shall subject the person or corporation in default to a penalty of not greater than two hundred and fifty dollars, to be recovered by the owner of the land by action in the superior court of the county: Provided, That no more than one crossing in every half mile shall be required under this act upon the property of any one owner." Rem. & Bal. Code, § 8729.

Section 3 provides that the person or corporation owning or operating the railroad shall be subject to a penalty in double the market value of the stock injured or killed, in case of failure to notify the owner within 48 hours after the accident; and section 4 allows a reasonable attorney's fee to the plaintiff in any such action. Sections 3 and 4 of this act were declared unconstitutional by this court in *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149, 53 Am. St. 868. An act covering this same general subject was approved March 16, 1903, Laws 1903, p. 332, entitled, "An act compelling railroads to fence their rights of way and to protect the owners of stock injured by moving railway trains, declaring a law of negligence with regard to stock injured by railway trains." Section 1 of this act reads as follows:

"Every person, company or corporation having the control or management of any railroad shall, within six months after the passage of this act, outside of any corporate city or town, and outside of the limits of any side track or switch, cause to be constructed and maintained in good repair on each side of said railroad, along the line of said rights of way of such person, company or corporation operating the same, a

substantial fence, and at every point where any roadway or other public highway shall cross said railroad, a safe and sufficient crossing must be built and maintained, and on each side of such crossing and at each end of such side track or switch, outside of any incorporated city or town, a standard cattle guard: Provided, That any person holding land on both sides of said right of way shall have the right to put in gates for his own use at such places as may be convenient."

A third act covering the same subject was approved March 19, 1907, Laws 1907, p. 169, entitled, "An act compelling railroads to fence their rights of way and to protect the owners of stock injured by moving railway trains, declaring a law of negligence with regard to stock injured by railway trains." The only substantial difference between the acts of 1903 and 1907 lies in the fact that the latter act extends to and includes electric roads. Rem. & Bal. Code, § 8730 *et seq.*

Under the foregoing facts the appellant contends that the acts of 1903 and 1907 repealed the act of 1893 by implication. This contention must be sustained. All three acts relate to the same subject-matter; namely, the liability of railroads for failure to fence their tracks. Each act makes provision for crossings where the same person owns land on both sides of the track or right of way. The act of 1893 required persons or corporations owning or operating the railroad, "at their expense, to put in place and maintain such crossings with gates or bars as may be necessary to give the owner, together with his stock, access to the several parts of his occupied or enclosed and cultivated lands." On the other hand, the acts of 1903 and 1907 provide, "That any person holding land on both sides of said right of way shall have the right to put in gates for his own use at such places as may be convenient." There is a palpable and irreconcilable conflict between these several acts. Under the earlier act, the duty to place and maintain gates and crossings was imposed on the person or corporation owning or operating the

railroad, while under the later acts the duty is as clearly imposed on the landowner. The latter acts contain no express repealing clause, and repeals by implication are not favored, but the legislative intent, when once ascertained, is controlling. As said by this court in *State ex rel. Great Northern R. Co. v. Railroad Commission*, 52 Wash. 33, 100 Pac. 184:

"So that it becomes a question altogether of the construction of the act of the legislature, and the duty of the court is to ascertain the legislative intent. While it is true that the former acts have not been specifically repealed, and while it is also unquestionable that repeals by implication are not favored, it is as well established that, where there is a conflict between a statute and a subsequent statute, the subsequent statute being the later expression of the legislative will upon the subject, must be considered in force and to operate as a repeal by implication of all prior acts or parts of acts in conflict therewith."

When we look at these different acts, covering as they do the same subject-matter, the fencing of railroads and the maintenance of crossings, we see no escape from the conclusion that the act of 1893 has been abrogated and repealed. The complaint also refers to the act of 1907, but there is nothing in that act to support an action of this kind.

The judgment is therefore reversed with directions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

GOSE, CHADWICK, FULLERTON, and MORRIS, JJ., concur.

[No. 8395. Department One. February 26, 1910.]

## HEGE, HACHEZ, PHILLIPS & COMPANY, *Respondent*, v. H. HESSEL, *Appellant*.[1]

BROKERS—COMMISSIONS—CONTRACTS. In an action to recover a broker's commission, under defendant's offer to sell and his promise in writing to pay the commission, the right to recovery is fixed by procuring a purchaser ready and willing to buy, followed by defendant's refusal to convey, and it is immaterial that the purchaser's written acceptance of the offer was conditional in form.

BROKERS—COMMISSIONS—CONTRACTS—FRAUDS, STATUTE OF. No recovery can be had against a vendor upon his refusal to convey, for loss of a broker's commission agreed to be paid the vendee, where the vendor has not bound himself in writing to pay the commissions as required by the statute of frauds.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered June 18, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Modified.

*Leon B. Kenworthy*, for appellant.

*S. Edelstein* and *Will H. Fouts*, for respondent.

CHADWICK, J.—No statement of facts that we can consider is before us, and the only question for our determination is the sufficiency of the complaint.

On November 25, 1908, defendant signed and delivered to plaintiff the following writing:

"Spokane, Wash., Nov. 25, 1908.

"Hege, Hachez, Phillips & Co.,

"Spokane, Wash.

"Gentlemen: For one week from date I hereby make the following offer to Mr. Mulcahy, owner of W. ½ of the E. ½ Sec. 4, and E. ½ of S. W. ¼ S. 4, and S. E. ¼ of N. W. ¼ of S. 4, T. 10, R. 20, twenty miles south of Missoula, Montana, including perpetual water right to the water coming through Tie Chute Canyon, with the ditches built. I

[1]Reported in 107 Pac. 375.

will take the above land and assume the mortgage thereon of $600 due in about two years at 8 per cent. interest, and pay for the same by turning in as payment thereon my hotel, known as the Airdrie Hotel, Airdrie, Alberta, it being understood that Mr. Mulcahy is to assume a mortgage to be placed thereon for $7,000, at 8 per cent. $450 of which is to be paid in April, 1910, balance at the rate of $450 every six months, and I reserve the right to at any time have another party mortgage the place for any amount below the amount unpaid. Interest semi-annually. I agree to pay you a commission of 2½ per cent. on my property in event the deal is closed as above. H. Hessel."

It is alleged that "G. P. Mulcahy accepted said offer both orally and in writing in the presence of said defendant Hessel, the written acceptance being in words and figures following and indorsed upon the original offer: 'I accept the above proposition provided his statement of property agrees with description. Com. $150 if deal goes.'"

Out of this state of facts plaintiff makes two causes of action: (1) for the two and one-half per centum as provided in the main contract, and (2) for the $150 which Mulcahy had agreed to pay, and would have paid if the trade had been carried out by Hessel. The point is made that the acceptance signed by Mulcahy was conditional, and for that reason defendant cannot be bound by his contract. The liability of defendant under the first cause of action does not depend upon the form of the written acceptance, but upon the readiness, willingness, and ability of the other party. The complaint alleges that Mulcahy was ready and willing to carry out the contract, and would have done so but for defendant's refusal. An agreement to sell, a promise in writing to pay a commission, a willingness and ability to buy, and a refusal to convey, are the structural parts of the complaint in this class of cases. Applying this test the complaint stated a cause of action and will sustain the judgment to the extent of the demand made under it.

No recovery can be allowed under the second cause of action. It falls within, and must be construed with reference to, the amendment to the statute of frauds, Laws 1905, page 110. It is alleged in the complaint that defendant knew of the promise of Mulcahy to pay plaintiff the $150 commission. This was no doubt put into the complaint to meet the accepted proposition of law that a real estate broker cannot, in the absence of an express agreement or a disclosure of his true relation, act as agent for both the vendor and vendee. But this is not enough. No recovery against defendant can be had, either directly or by way of damages, for the loss of the commission, unless he has bound himself in writing. This he did not do. The statute is quoted and cases collected in *Swartswood v. Naslin*, *ante* p. 287, 106 Pac. 770.

The judgment of the lower court will therefore be reduced in the sum of $150, with interest thereon from the 27th day of November, 1908, to May 26, 1909, the date of the judgment, at the rate of six per cent per annum. With this modification the judgment is affirmed. The appellant will recover costs on appeal.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8333. Department One. February 26, 1910.]

# LEANDER ANDERSON, *Respondent*, v. GLOBE NAVIGATION COMPANY, *Appellant*.[1]

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—WARNING—RELIANCE UPON—QUESTION FOR JURY. The question of the contributory negligence of a longshoreman, engaged in the loading of a lumber schooner, in not taking a signal to hoist as a warning of the approach of a sling load, is for the jury, where it was customary for the hatch tender and his duty to give a direct warning to the longshoremen and for them to work rapidly in reliance thereon.

SAME—ASSUMPTION OF RISKS—FAILING TO WARN. A longshoreman engaged in loading a lumber schooner does not assume the risks of negligence of the mate in failing to give warning of the approach of a sling load, where the mate supervised the work and tended hatch, and the workmen had to rely upon his giving the signals.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. Error cannot be predicated upon an improper statement of a witness, struck out on motion of the appellant, where no prejudice appears.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE — EVIDENCE OF CUSTOM—ADMISSIBILITY. Evidence that it was customary for all the longshoremen engaged in loading a lumber schooner to rely on the signal of the mate to warn them of the approach of the loaded sling is admissible upon the issue of plaintiff's exercise of due care in relying upon such warning being given.

PRINCIPAL AND AGENT—RELATION—EVIDENCE—SUFFICIENCY—MASTER AND SERVANT—INDEPENDENT LESSEE. Evidence that a foreign corporation, the owner of a vessel, directed its operation, took the freights earned and paid the expenses of operation, makes a question for the jury upon an issue as to whether a local corporation in charge was an independent lessee, because so styled in a lease, or merely the agent of the owner and the lease a mere makeshift to avoid liability for personal injuries.

WITNESSES—IMPEACHMENT—REMOTENESS—PRINCIPAL AND AGENT—EVIDENCE. Upon an issue as to whether the nominal lessee of a vessel operated it as an independent lessee or as agent for the owner, a witness who testified that the lessee owned no vessels and purported to operate vessels of the owner only, may not be impeached by the lessee's answer in an action in which it admitted ownership of a certain other vessel, where the two events were not sufficiently connected in point of time to even remotely contradict the witness.

[1]Reported in 107 Pac. 376.

TRIAL—ORDER OF PROOF. Error cannot be predicated upon the refusal to admit evidence in support of appellant's case in chief where it was offered out of order upon cross-examining the adverse party's witness on rebuttal.

MASTER AND SERVANT—NEGLIGENCE—WARNING—INSTRUCTIONS. In an action for personal injuries sustained by a longshoreman engaged in loading a lumber schooner, where the master, for the purpose of hastening the work, had assumed the burden of warning servants of the approach of a loaded sling, and the men were required to rely on the warning, it is proper to refuse any requested instruction which told the jury that the workmen must rely on their own resources to protect themselves, and not on the warning.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 20, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a longshoreman while loading a ship. Affirmed.

*Roberts, Battle, Hulbert & Tennant*, for appellant.

*Alexander & Bundy*, for respondent.

FULLERTON, J.—The respondent is a longshoreman, and on February 15, 1907, was employed as such in loading the lumber schooner Alex T. Brown. The lumber was brought alongside the schooner on scows, from whence it was carried to the schooner deck in sling loads, by means of a hoisting rigging operated by a steam winch. After being carried to the deck, the lumber was deposited on a block, from whence it was distributed to the various parts of the vessel by the longshoremen. The respondent was working on the port side of the vessel, taking lumber from a block and storing it forward. The loading was done under the direction of the first mate of the vessel, who also acted as hatch tender. It was his duty to signal the winch driver when to hoist and when to lower the sling loads, and to warn the longshoremen of the approach of a sling load that they might get out of the way. The work was done rapidly and the longshoremen

paid no attention to the approach of the sling loads until they heard the warning given by the mate.

The respondent while engaged in his work was injured. In the regular performance of his duty, he picked from the block a piece of timber of considerable size and length, and was proceeding to carry it away, when a sling load of lumber was dropped on the end next the block, knocking him down. No warning was given of the approach of this sling load. The mate, after giving the signal to hoist the load, seems to have turned away from his usual post, and the respondent, relying on the belief that a signal would be given, failed to look out for himself, and was injured in consequence. This action was brought to recover for the injuries so suffered. At the trial in the court below the jury returned a verdict in respondent's favor for the sum of $600, and judgment was entered thereon, from which this appeal was taken.

The appellant insists that the respondent was guilty of contributory negligence, and that he assumed the risk of injury from the operation of the sling. The first branch of the contention is based on the claim that the respondent, being an experienced sailor and longshoreman, should have taken the mate's signal to hoist as a warning of the approach of the sling load and kept out of the way. But we are clear that, under the facts of the case, this was a question for the jury. It was customary for the mate to give a direct warning to the longshoremen themselves, and the respondent had the right to rely upon this custom, and it was for the jury to say whether there was anything unusual connected with the hoisting of this particular load that would render the customary warning unnecessary. Nor did the respondent assume the risk of injury from a failure to warn on the part of the mate. The business of loading the schooner with lumber could not be safely carried on without supervision on the part of someone. When, therefore, the master undertook to supervise the work, it was bound to exercise ordinary care in the performance of the duty, and its failure so to do

renders it liable to its servants for injuries caused thereby. The servants did not assume the risk of injury caused by its neglect.

It is next complained that the court erred in allowing a witness to testify to an accusation he had made against the mate at the time of the injury. But as we read the record, there was nothing left of the statement after the court, on motion of counsel, had eliminated the supposedly objectionable parts. The record was left in a condition somewhat confusing as to the matters the jury could properly consider as evidence, but we find in it no prejudicial error.

A number of witnesses were allowed to testify, over the objection of the appellant, that it was the custom of all the longshoremen working on this vessel at the time the appellant was injured to depend on the signal of the mate to warn them of the approach of the loaded sling, and not to look out for it themselves. It is urged that this is error for the reason that the longshoremen were bound under the law to exercise ordinary care in protecting themselves; and that if, by reasonable care, the respondent could have protected himself from injury by the loaded sling, it was his duty to so exercise it, regardless of the custom. This contention is no doubt sound, but this evidence, as we view the record, was introduced for the purpose of showing what was reasonable care under the circumstances. If all of the longshoremen relied upon the mate to warn them of the approach of the sling, and this was the custom under like conditions, it is some evidence that the respondent was exercising ordinary and reasonable care for his own safety in following the custom, and it was not error to admit it.

The appellant is incorporated under the laws of New Jersey, and is admittedly the owner of the schooner on which the respondent was working. It set out in its answer, however, and at the trial attempted to show, that it had leased the schooner to a corporation organized under the laws of this state known as the Globe Navigation Co., Ltd., and that

this latter corporation was operating the vessel at the time of the respondent's injury under its lease, and was alone responsible for any injury occurring to the persons employed as laborers thereon. The respondent, in rebuttal, offered evidence tending to show that this lease was a mere makeshift, intended for the purpose of relieving the appellant from liability for accidents of this character, whereas in truth and in fact it was operating the vessel for its own benefit and profit through the second corporation as its agent. The court submitted this question to the jury, and the appellant now contends that this was error; that there was, in fact, no competent evidence tending to dispute the fact that the lessee corporation was not operating the vessel on its own behalf. But without entering upon a review of the evidence, we hold that the court properly submitted the question to the jury. The local corporation cannot be held to be an independent lessee merely because the lease so styles it. Whether it was so, depends upon the character in which it in fact was acting. If it is a fact, as the evidence tended to show, that the appellant directed the operation of the vessel, took the freights earned by it, and paid the expenses of operation, it was competent for the jury to find that the appellant was the real principal and the local corporation a mere agent.

In this connection the appellant complains of the exclusion of certain evidence. One H. R. Clise, called as a witness on behalf of the respondent, testified concerning the relations between the appellant and the local corporation. On cross-examination he testified, in answer to questions propounded by appellant's counsel, that the local corporation owned no vessels itself, but that all of those it purported to operate were the property of the appellant. He was then asked if the local corporation did not, in an answer filed to an action brought against it, admit its ownership of a vessel known as the William T. Nottingham. To this an objection was interposed and sustained, whereupon the appellant offered the answer itself, which was excluded also. These rulings are

assigned as error, but we think the rulings correct. If the purpose was to impeach or contradict the witness, the two events were not sufficiently connected in point of time to even remotely do that. If it was offered as independent evidence in support of the appellant's case in chief, then it was rightly rejected as being offered out of its proper time. The order in which evidence is introduced is, of course, not very material, and the courts generally hold that evidence duly admitted, although irregularly, is entitled to all the consideration it otherwise deserves. But error cannot be predicated on the fact that the trial court enforces technical rules governing the admission of evidence.

Finally, objection is made to certain instructions given by the court, and to certain others requested by the appellant and by the court refused. The exception to those given is based upon a different view of the evidence from that taken by the trial court and by us in this opinion, and is sufficiently answered by what has been said concerning the sufficiency of the evidence. Those requested and refused, with the exception hereinafter noticed, require no special consideration. In so far as they were pertinent, they were included in the general charge given by the court.

Requested instructions numbered five and six were as follows:

"(5) You are instructed that the duties of the plaintiff and the defendant are reciprocal and while the defendant was required under the law to exercise reasonable care, the plaintiff was also required to exercise reasonable care in working in handling the lumber and performing the duties required of him under his employment. If the plaintiff could have seen that the slingload of lumber was about to strike the piece of lumber he held in his hands, by the exercise of reasonable care on his part, then the law imposes on him the duty of seeing. It is the duty of a man working in a dangerous place or a place where he is liable to receive injury, to make a reasonable inspection of the conditions about him and the method of doing the work. He is also required to keep a lookout for approaching dangers that he is acquainted with,

and if a man is injured while working about any kind of work by reason of his own failure to keep a reasonable lookout and to exercise his natural faculties in a reasonable way to avoid an accident, he cannot recover. And if you find in this case that the plaintiff by the exercise of reasonable care on his part could have seen and understood the danger and could have avoided the same by keeping a reasonably careful lookout and observation on his part, then he cannot recover and your verdict must be for the defendant.

"(6) You are instructed that it was the duty of the plaintiff to perform his work in a careful manner and to do it in a way and at a time that was safe, if he could have done so, and if he knew that a slingload of lumber, or if he should have known that a slingload of lumber was about to be raised or swung in from the vessel and that it was liable to strike the piece of lumber that he had in his hands, then it was his duty to exercise reasonable care to avoid injury by reason of this slingload of lumber being swung in on the deck of the vessel, and if you believe from the evidence that the plaintiff knew or could have known by the exercise of reasonable care on his part that the slingload of lumber was being swung in upon the vessel and that the same was liable to strike the piece of lumber he had in his hands, and he failed to exercise reasonable care in this regard, then your verdict should be for the defendant."

These requests, while they might be appropriate under other conditions, seem to us wholly inapplicable to the facts as shown by this record. Here, the master, for the purpose of better handling its work, had assumed the burden of warning its servants of the approach of this sling. The servants were not only invited but required to rely on this warning to protect them from danger. They were expected to go to the blocks and take away the lumber at all times other than such times as they should be told not to go. The arrangement was one intended to hasten the work. It was for the master's benefit. Any instruction, therefore, which told the jury that the workmen must rely upon their own resources to protect themselves, and not on the warning given by the

master, would be contrary to the law arising from the facts proven, and hence in itself error.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

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[No. 8362. Department One. March 1, 1910.]

## J. ALBERT CURRY, *Appellant*, v. RICHARD WILSON *et al.*, *Respondents*.[1]

APPEAL—DECISION—LAW OF CASE—CONCLUSIVENESS. The facts and legal conclusions as found upon a former appeal are conclusive on the second appeal of a case.

SUBROGATION—INVALID MORTGAGE—WHAT LIENS INCLUDED. There can be no subrogation in favor of a mortgagee, as against the interests of an insane wife, by reason of equities existing at the time the husband executed the mortgage, where at the time the wife was adjudged insane there was no demand against her and no equitable lien on the property subsequently mortgaged.

QUIETING TITLE—RELIEF GRANTED—PERSONAL JUDGMENT—PLEADING. It is not error to refuse to enter a personal judgment against a defendant where the prayer of all the pleadings was for a decree quieting title to real property.

HUSBAND AND WIFE—COMMUNITY PROPERTY—PUBLIC LANDS—FEDERAL HOMESTEAD—STATES—SOVEREIGNTY. Under Rem. & Bal. Code, §§ 5915-5917, a homestead acquired from the Federal government by a married man during the lifetime of his wife is community property; and the state has the sovereign power to fix its character irrespective of Federal statutes.

DISMISSAL AND NONSUIT—VOLUNTARY—DISCRETION. It is not an abuse of discretion to refuse a voluntary dismissal of an action to quiet title after it had been consolidated with another suit in which defendants asked affirmative relief.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered October 7, 1908, upon findings in favor of the defendant, in an action to quiet title. Affirmed.

[1]Reported in 107 Pac. 367.

*Million & Houser*, for appellant.

*Henry A. McLean* and *D. G. Wakefield*, for respondents.

CHADWICK, J.—This case has been before this court—*Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065, to which reference may be made for the facts. The court there said: "We cannot under the record properly determine all the equities between the parties." The case was sent back for the ascertainment of such equitable claims as might exist in favor of Curry, the present appellant. The validity of the mortgage upon which appellant's title rests, as well as the subsequent foreclosure proceeding, was denied in the former case; and although appellant insists that he has been denied a constitutional right and that he has been, and is being, deprived of his property without due process of law, the validity of the mortgage and the mortgage foreclosure was fully considered by this court on the former appeal, and the claim of the appellant that he has been given no opportunity to be heard on these questions finds no support in the record. We feel bound by the facts as found by this court, as well as by its legal conclusions. Therefore, the only question for the trial court to determine was the items and amounts legally and equitably chargeable against the property.

Under the theory that he is being deprived of his property without due process of law, appellant seeks to open up the main question decided in the former opinion, and seems to make the further point in his brief that a part if not all of the amount represented by the original mortgage was an existing equity against the land at the time the mortgage was given, and should for that reason be allowed. If this were true, appellant would no doubt have a right of subrogation, but here again we are met by the fact that, at the time Mrs. Wilson was adjudged insane, there was no lawful demand against her or any equitable lien upon the property. Hence there can be no subrogation. To meet the issues within the rule of our former decision, appellant filed, in obedience to

an order of the trial court, a bill of particulars, in which the payment of taxes running over a period of ten years was claimed. It was also set up that:

"(2) *Plaintiff claims that the money which was advanced by J. A. Cloud to Richard Wilson was used by said Wilson for the purpose of paying off valid liens and obligations then existing against said real estate,* and for the purpose of keeping, maintaining and supporting the family of said Wilson, and that plaintiff is unable to give a more particular or specific bill of particulars of said moneys, for the reason that all of the facts and data are peculiarly within the knowledge of the defendants and especially of defendant Richard Wilson.

"(3) That the moneys loaned by said Cloud to said Richard Wilson as said guardian, were used for the purpose of clearing, fencing and otherwise improving said real estate, the facts of which are peculiarly within the knowledge of the defendants and especially of defendant Richard Wilson.

"(4) That plaintiff claims that a large amount of the money paid by said Cloud to said Richard Wilson was used for said Richard Wilson in the payment of debts and obligations incurred in the care, keeping and support of the minor children of said Richard Wilson and wife, and for which the property of said Richard Wilson and wife were liable";

all of which was stricken by the court except the part which we have italicized. We learn from the briefs that appellant offered to file an amended pleading, setting up the items inserted in the bill. This offer was denied by the court. The proffered pleading is not in the record. But, assuming, for the purposes of the argument, that it goes no further than the bill of particulars, we shall discuss the case as if it were before us.

The bill of particulars claimed that the money advanced by Cloud at the time the first mortgage was given was to pay off valid and subsisting liens against the property. This question was therefore before the court under the former decision, and testimony might have been taken on this issue, but it does not appear that any was offered at the trial. The conclusion is inevitably forced that the equities in this re-

gard are the same as those asserted at the former trial, and that the finding of this court that the estate of Augusta Wilson was in no way indebted at the time of her commitment to the asylum, was correct.

The trial court made the following findings:

"From the evidence adduced and from the stipulations of counsel made in open court, the court makes the following findings of fact: That all questions save and except those involving the validity of the mortgage and the foreclosure proceedings are now tried by this court, and that the amount of taxes paid by said J. Albert Curry and his grantors, and the amount of improvements and betterments and all claims of said J. Albert Curry and his grantors equal the amount of the rents and profits, and that all claims of said parties equalize each other, and that there is nothing due from either party to the other for or on account of the possession of the property involved herein. To which finding both parties consent and waive all exceptions.

"That the amount of damage sustained by said Richard Wilson and Augusta S. Wilson, by reason of the possession of said property by said J. Albert Curry and his grantors equals the amount of taxes, improvements and betterments paid and made by said J. Albert Curry and his grantors, and that there is nothing due from either party to the other."

We think these findings are sustained by the record, and dispose of this feature of the case.

The point is made that the court erred in refusing to enter a personal judgment against Richard Wilson. There is nothing in the record showing a right to such judgment. The prayer of all the appellant's pleadings is for a decree quieting his title, and the decree of the court is within the issues.

Appellant, in furtherance of his demands, raises a new question on this appeal. He says:

"The records show that Richard Wilson acquired title to the land in question by patent from the United States government by virtue of the preemption laws, and it is our contention that the title passed from the United States to Richard Wilson without any restrictions; in other words, that the

state has no authority to say what kind of title the husband gets from the government, and when the government gave a patent of the land to Richard Wilson, the state authorities have no power to say that this land belongs to other than the patentee. See, *McCune v. Essig*, 199 U. S. 382."

The case of *McCune v. Essig*, and all kindred cases, go no further than to hold that a surviving spouse, who complies with the Federal statute and makes proof under it, takes title in his or her own right; that the state cannot overcome the terms and intendments of the Federal law by enacting a rule of descent or of property inconsistent therewith. But here we have an entirely different question. The title passed in the lifetime of the husband and wife. The land was not acquired by gift, bequest, devise, or descent, and was therefore community property under the statute. Rem. & Bal. Code, §§ 5915-5917. It was so held in *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671, and to the extent of this holding that decision has never been doubted or denied. See, *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N. S.) 967. The right of the state to fix the character of property acquired by its citizens and the terms under which it shall be holden is a right of sovereignty, and a matter in which the Congress of the United States can have no concern. *Krieg v. Lewis*, 56 Wash. 196, 105 Pac. 483; *Delacey v. Commercial Trust Co.*, 51 Wash. 542, 99 Pac. 574; *Wilcox v. Jackson*, 13 Pet. 498.

Appellant also assigns as error the fact that the court denied the right to dismiss his action without prejudice. Reference to the former decision will show that the case was begun by appellant to quiet title. Another was begun by respondents to assert their rights in the property. These cases were consolidated. So long as any one was before the court asking affirmative relief, it was no abuse of discretion for the court to deny the motion.

Finding no error in the record the judgment is affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8473. Department One. March 1, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. FRED E. BIGGS, *Appellant*.[1]

CRIMINAL LAW—TRIAL—ELECTION OF DATES—SUFFICIENCY. Upon a charge of rape committed between the first and the 26th days of a specified month, an election, upon demand of the defendant, to prove an offense committed between the 19th and 26th days is sufficiently specific.

RAPE—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction of rape committed between the 19th and 26th days of a certain month, where it appears that the prosecuting witness was under the age of consent; that between said dates she and the defendant registered at different hotels as man and wife under assumed names and occupied a single room over night; that the defendant was arrested while occupying a bed with her, and that a physical examination by a physician a few days after showed evidence of recent penetration.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered February 27, 1909, upon a trial and conviction of rape. Affirmed.

*H. C. Barney* and *M. P. Hurd*, for appellant, contended, among other things, that the evidence was insufficient. *State v. Scott*, 28 Ore. 331, 42 Pac. 1; *Hardtke v. State*, 67 Wis. 552, 30 N. W. 723; *State v. Dalton*, 106 Mo. 463, 17 S. W. 700; *People v. Howard*, 143 Cal. 316, 76 Pac. 1116; *State v. Marselle*, 43 Wash. 273, 86 Pac. 586; *State v. Powell*, 51 Wash. 372, 98 Pac. 741.

*Augustus Brawley*, for respondent.

FULLERTON, J.—The defendant was informed against by the prosecuting attorney of Skagit county for the crime of rape, committed upon the person of a female child under the age of 18 years, the charging part of the information being as follows:

"That at the City of Anacortes, Skagit county, State of Washington, and within one year last past, to wit: between

[1]Reported in 107 Pac. 374.

the first day of January A. D. 1909, and the 26th day of January A. D. 1909, the said defendant Fred E. Biggs did unlawfully have sexual intercourse with and carnally know one Kathrine Sunderman, the said Kathrine Sunderman, being a female child under the age of eighteen years, and not being the wife of the said defendant, contrary to the statutes in such cases made and provided and against the peace and dignity of the people of the State of Washington."

To the information the defendant pleaded not guilty, and the cause was set down for trial. On the trial, after the jury had been empaneled and sworn, the defendant moved the court to require the state to elect on which of the dates between the first and twenty-sixth of January, 1909, they expected to prove that a crime had been committed by the defendant. The prosecuting attorney thereupon stated that he expected to show that the offense was committed between the 19th day of January, and the 26th day of January, 1909. The court held the election sufficient, whereupon the parties proceeded to a trial of the cause.

The state's evidence tended to show that the prosecuting witness was, at the time of the commission of the offense, under the age of fifteen years, and was unmarried; that she accompanied the defendant to a hotel at Seattle on January 18, 1909, where they registered as "F. E. Bradley & wife, Port Townsend," and where both were assigned to a single room; that on January 20, 1909, they appeared at a hotel in Anacortes where they registered as "F. E. Biggs & wife, New York," both again being assigned to a single room in which there was but one bed; that they occupied this room together from January 20, 1909, to January 26, 1909, until about 7:30 o'clock in the morning, at which time the defendant was arrested, he being taken from the bed then occupied by himself and the prosecuting witness. It was further shown that a physical examination was made of the girl a few days after the arrest of the defendant, by a physician, who testified that her vagina then bore evidences of recent penetration.

The jury returned a verdict of guilty, on which the de-

fendant was sentenced to the penitentiary for a term of years. This appeal was taken therefrom.

It is contended that the court erred in not requiring the state to select some specific act occurring upon a specific date, as the act he expected to rely upon for a conviction, but we think there was no error in this respect. But one offense was charged and but one attempted to be proven, and the defendant was not deprived thereby of any defense he sought to make to the charge.

The remaining assignments go to the sufficiency of the evidence. It is contended that the evidence is insufficient because there is no direct evidence of the overt act. But this was not necessary. The crime of rape, like other crimes, may be proven by circumstantial evidence. If this were not so there never could be a conviction for the crime where the victim of the crime refused to testify, or became incapacitated from so doing between the time of the commission of the offense and the time of the trial of the accused. The circumstances shown in the case before us certainly warranted the jury in reaching the conclusion that the defendant was guilty of the offense charged against him. Credulity, no doubt, may take a wide range, but it would be extending it far indeed to believe that this record contains no evidence tending to prove that the appellant had carnal knowledge of the body of the prosecuting witness at the time and place designated in the information.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8561. Department One. March 1, 1910.]

STONEWALL J. LINDSAY *et al.*, *Respondents*, v. HENRY A. DAVIDSON *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—RESCISSION BY VENDEE—FRAUD. A trade of real estate may be rescinded by a vendee who took land lying at a distance without having seen it, relying upon representations, known by the vendors to be false, to the effect that 100 acres were under cultivation and 21 acres irrigated, with orchard, etc., where there were only 25 acres under cultivation and no irrigation or orchard.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 1, 1909, upon findings in favor of the plaintiffs, in an action for equitable relief. Affirmed.

*Samuel Edelstein*, for appellants.

*Poindexter & Moore* and *George H. Armitage*, for respondents.

MORRIS, J.—Appeal from a decree vacating a deed from respondents to appellant Bowman.

The respondents, on March 16, 1909, were the owners of two hundred and forty acres of land, in Ferry county, of the value of $2,400, but resided at Potlatch, Idaho. On that day respondent Stonewall J. Lindsay, being at Spokane, called at the office of appellants, who were engaged in the real estate business as the Davidson Investment Company, with the purpose of listing the Ferry county lands for sale. During the negotiations, appellant Bowman represented to him that W. S. Nier, owning one hundred and sixty acres of land in Franklin county, one hundred acres of which were under cultivation, twenty acres irrigated, and five acres in alfalfa, all fenced and improved with dwelling house, barn and orchard, having also a dam for impounding water for irrigation, which had been constructed at a cost of $500, had

[1]Reported in 107 Pac. 514.

listed the same with appellants for sale; that these lands were of the value of $3,500, and were subject to a mortgage of $1,000; and suggested an exchange. Bowman had no knowledge of the Ferry county lands, nor was Lindsay familiar with the Franklin county lands. The court finds that each of the parties, relying absolutely upon the description of the respective lands, and believing all the representations respectively made by each as to the character, value, and condition of the two pieces, finally agreed upon an even exchange. Lindsay and wife thereupon executed a deed of the Ferry county lands, in which Bowman is named as grantee, but which they thought was for the use and benefit of Nier; and Bowman gave Lindsay a deed executed by Nier and wife November 12, 1908, in which the name of the grantee had been left blank, the blank being filled by inserting the name of Stonewall J. Lindsay as grantee.

The court further finds that subsequently Lindsay visited the Franklin county land, and then for the first time discovered that the representations made by Bowman as to their condition and value were false; that only twenty-five acres were under cultivation, three acres in alfalfa, no part of the land under irrigation, no dam for the impounding of water for irrigation, no orchard; that the house and barn were of little or no value; that the greater portion of the land was incapable of cultivation, and that the value thereof did not exceed $1,000. It is further found that these false representations were made with full knowledge of their falsity and with intent to deceive, and that respondents would not have consented to the exchange except for their reliance upon the truth of the facts as represented to them by Bowman. It also appears that Bowman, under the impression conveyed to respondents that he was representing Nier in the exchange, demanded and received from respondents a commission of $60.

Upon Lindsay's return to Spokane he called on appellants and made complaint "that they had skinned" him. Bowman, he says, told him "to quit whining," and he would sell the

property and "get you out of it"; that he could not do anything with Nier because the Ferry county land had been taken out of their hands, but that he would see Nier and "see if we can't do something for you." Bowman's version of this conversation is that, when Lindsay said he wanted to trade back, "I said I didn't want to do boy's work that way. I thought you was a man that wouldn't squeal if you got it in the neck." It is also shown that Nier knew nothing about the transaction, and had had no connection with the Franklin county land since November 12, 1908, when he traded it to appellants. The findings of the court, as we have set them forth, are amply sustained by the evidence and support the judgment in favor of respondents. In addition to the representations as made by Bowman, we find a circular issued by appellants in which the Franklin county land is described as

"3500—160 acres described as follows: 100 acres under cultivation, 20 acres under irrigation, 5 acres alfalfa, all under fence, house, barn and orchard. Mtg. $1000. 3 year. 8 per cent, located near Washtucna";

which was given by appellants to Lindsay at the time of his first visit to their office. All that need be said upon the law of the case is a reference to what was said by this court in actions of this character in the late cases of *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, and *Bailie v. Parker*, 56 Wash. 353, 105 Pac. 884, where it was held that a vendee may rely upon representations of his vendor where the property is at a distance, or where for any other reason the falsity of the representation is not readily ascertainable.

The above cases, amply supported by authority, are decisive of the case, and the judgment is affirmed.

Rudkin, C. J., Fullerton, Chadwick, and Gose, JJ., concur.

[No. 8571. Department One. March 1, 1910.]

CHARLES W. ERICKSON, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY, *Appellant*.[1]

RELEASE AND DISCHARGE—EXECUTION—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained by a railroad brakeman, the evidence conclusively shows a valid release and settlement, barring the right to recover, where it appears that the plaintiff received $225 and signed a typewritten release and discharge, showing just above the signature a statement that he had read the release and fully understood it; that plaintiff must have been mistaken in his testimony that he received the money only as a donation and signed a blank sheet of paper so folded as to show only four blank lines; that the release signed could not have been so folded; that the nurse and physician, who witnessed the release, corroborated the defendant's claim agent in the statement that the release was read and signed by the plaintiff; and that plaintiff subsequently wrote letters referring to the settlement; no claim being made of fraud or that plaintiff was overreached or advantage taken of his condition.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered August 12, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained by a brakeman in a fall from a train. Reversed.

*F. V. Brown*, *L. F. Chester*, *J. J. Lavin*, and *E. M. Carr*, for appellant.

*Plummer & Latimer*, for respondent.

MORRIS, J.—Respondent brought this action to recover for injuries sustained in falling or being thrown from one of appellant's trains upon which he was acting as brakeman, the negligence alleged being excessive speed of the train and poor track and roadbed. Appellant denied negligence, and among other affirmative defenses pleaded a full settlement and release upon the payment of $225. Respondent admitted

[1]Reported in 107 Pac. 365.

receiving such sum from the company, but denied that it was given him in any release or settlement of his claim against the company, and averred it was a voluntary payment by the company, given as a donation because of his loss of time and a friendly feeling toward him, and because it was desired to retain his good will and to have him enter its employment upon his recovery. At the conclusion of the evidence, the appellant challenged its sufficiency to sustain a verdict; which motion being denied, the case was submitted to the jury, and a verdict was returned in favor of respondent in the sum of $1,250. Appellant then moved for judgment *non obstante veredicto*, which was denied, and it then appealed, the questions presented here being the correctness of the court's ruling upon these two motions.

In determining these questions, the only thing that need be considered is the alleged settlement and release. The injury happened June 14, 1907, at or near Shelby, Montana. Respondent was taken to Whitefish, where he was placed in a hospital and given medical aid and attention. On July 19, respondent says, he was called on by Mr. Bissell, the general claim agent of the company, who told him that he had talked with the doctor concerning his condition and learned that he was all right; that he had no claim against the company, but that the company "always treat the boys all right and I will give you as a donation $225"; that Bissell wrote a check for that amount, which he indorsed, and Bissell then left the room and soon returned with $225, which he gave to respondent and, saying he would have "to have something to show what he had done with the money," he produced some papers and requested respondent to sign them; that the papers were folded up, but there was nothing on them, and that the paper signed by respondent was a blank; that at the time no one was present except his wife, Bissell, and himself.

The facts as disclosed and conclusively shown in the record, make it appear that respondent was very forgetful in giving

the above testimony. The paper identified by respondent as like the "folded paper" shown him by Bissell, folded in such a way, as to show only lines for witnesses and signature, is a regulation "release of damages" form of the appellant company, and as identified by respondent nothing could be seen thereon except four blank lines; while the release in the record to which respondent attached his signature is a thin sheet of typewriting paper that cannot be folded in the manner described by respondent. Neither could it, on account of its thinness, be folded in any manner but what it would disclose that it contained matter written thereon by a typewriter; and just above the line of signature, plainly showing if folded as respondent describes, are the words, "I have read the above release and fully understand the same." This paper, as now in the record, is still apparently folded in its original creases, and as so folded is at variance with the testimony of respondent. It bears date on the 20th of July, and is in effect a full settlement and release of all damages and claim for damages growing out of the injury. It is witnessed by Edward Tenner, traveling claim agent of appellant, who testifies he was the one who effected the settlement; that on the 20th, having been informed of the amount agreed upon between Bissell and respondent, he prepared the release upon a typewriter, in duplicate, and taking the release and a draft upon the treasurer of the company in the sum of $225, he went to the hospital, called Dr. Lees and Mrs. Bryant, a nurse, into respondent's room, telling them the purpose for which he was there, and read the release to Erickson; that he then placed the release, the receipt, and the draft open upon a stand in front of Erickson and that Erickson himself read them and then signed them with a fountain pen procured from Dr. Lees; that Dr. Lees, Mrs. Bryant and himself then signed as witnesses, and that he then paid Erickson the $225 in cash. In all this he is corroborated by Dr. Lees and by Mrs. Bryant, except that Mrs. Bryant is not positive as to hearing the papers read. The receipt

signed by Erickson could not be folded as indicated by Erickson in his testimony, it being upon a heavy piece of paper, still showing the original fold. The draft indorsed by respondent is also in the record, and is signed by Tenner, not by Bissell. On August 11 respondent wrote a letter to Bissell in which he refers to this settlement: "When you were at Whitefish and I settled." Again, "I trust you will give me time until well, as stated in settlement."

Respondent does not attack the settlement upon the ground of fraud or that he was overreached or advantage was taken of his physical condition, thus raising a triable issue for the jury; but his position in his pleading and in his testimony was that he never did make any settlement or sign any release. It appears that in this he was mistaken; that he not only executed a full release and settlement on July 20, but in subsequent letters to the company, asking for favors, sets forth the settlement and release as a reason why the favors should be granted. There is other substantiating testimony in the record which we do not care to take time or space to refer to. It is sufficient that it is conclusively shown that the release and settlement was made, and there being no fraud or other nullifying circumstance shown, it is conclusive of the cause of action and should have been so held by the court below upon the challenge to the sufficiency of the evidence, and upon the motion for judgment. And for such error, the judgment is reversed, and cause remanded with instructions to dismiss.

Rudkin, C. J., Chadwick, and Gose, JJ., concur.

Fullerton, J., concurs in the result.

[No. 8418. Department One. March 2, 1910.]

DAVID SANPERE *et al.*, *Respondents*, v. WALTER S. SANPAIR *et al.*, *Appellants*.[1]

CANCELLATION OF INSTRUMENTS—DEEDS—VALIDITY—ASSENT—EVIDENCE—SUFFICIENCY. The evidence sustains findings that deeds and leases executed by an aged couple to their nephews were void and without the assent of the parties, where it appears that the grantors were French Canadians, unable to read or write the English language and had little comprehension of English or of the difference between wills, deeds, and leases; that they set out with the intention to make a will in favor of two nephews for one-third interest in their lands, with a ten-year lease in their favor; but upon deciding to will one-half to their daughter and one-fourth to the nephews, and with that intent, upon the advice of an attorney that the effect would be the same, they executed deeds for such interests, taking back life leases; and that upon learning of the consequence of their acts, they repudiated the transaction and refused to recognize the leases or accept a division of the crops thereunder.

APPEAL—REVIEW—HARMLESS ERROR — EVIDENCE — CONCLUSION OF WITNESS. Where attorneys had testified to all that was said and done upon the execution of certain deeds in the way of explaining their effect to the grantors, who they testified apparently had a perfect understanding of the transaction, it is not error to exclude further questions as to whether they "explained the nature and character of the transaction"; since the question had already been answered and was objectionable as calling for a conclusion.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered April 8, 1909, upon findings in favor of the plaintiffs, in an action for equitable relief. Affirmed.

*Jesseph & Grinstead* and *Baldwin & Webb*, for appellants.

*H. G. Kirkpatrick* and *Merritt, Oswald & Merritt*, for respondents.

MORRIS, J.—In this action the respondents sought to set aside certain deeds and leases executed March 18, 1908, upon the ground of lack of consideration, fraud, and no compre-

[1]Reported in 107 Pac. 369.

hension of the nature and character of the transactions. Issue being joined, trial was had, and upon the entry of judgment in plaintiffs' behalf, the case is brought here.

The main error assigned is insufficiency of the evidence to sustain the findings. We cannot go into the record at length and recite the testimony given upon the questions involved, but will set out the main facts. The respondents were French Canadians, and owned three hundred and twenty acres of land, in Stevens county. David Sanpere was seventy years of age, and his wife some years younger. They were uneducated, unable to read or write the English language, could not write their names, and had little comprehension or conception of transactions of the character here involved. The wife, although she had lived over forty years in Stevens county upon the property in question, knew but little of our language or the use and meaning of words. She refers to such lack of understanding and says: "You see I never talk English before. I start only three or four years ago to talk English. I always talk French." The testimony of both of these old people shows they did not know or appreciate the difference between wills, deeds, and leases, all of which are involved in this controversy. Referring to a lease given to appellants for ten years, she says: "He makes up some—what you call them? some kind of paper for five years' work the ranch."

The appellants are nephews of David Sanpere, and had only known their uncle for a short time; Guy Sanpair having met respondents in 1905, and Walter in 1907. They lived with their uncle during the winter of 1907 and the spring of 1908, and during that time the old people seem to have become fond of them, to have placed much confidence in them, and had frequent conversations with them in regard to leaving some of their property to them. David Sanpere testifies that the boys would frequently ask him to make a will, especially Guy who was very solicitous in this regard. Finally, in March, 1908, the old people seemed to have made up

their minds to make a will, and divide their property between the two boys and their daughter, a Mrs. Welty, each to receive one-third. In addition, they agreed to give appellants a lease upon the ranch for ten years. This lease was drawn up and executed March 14, and at the same time the attorney who drew the same was given instructions to prepare wills by which each of the boys would receive one-third of the property.

On March 18, Mrs. Sanpere and Guy started for Kettle Falls to complete the execution of the wills, leaving Mr. Sanpere and Walter to follow later on in the day. When Mrs. Sanpere reached Kettle Falls, she objected to the division under which her daughter would only receive one-third of the property, and announced her intention of giving one-half of the property to the daughter and the other half to Guy and Walter. The attorney informed them that the wills could not be changed that day, but the same purpose would be effected by giving deeds to the daughter and the boys and taking back life leases, and Guy was sent back to the ranch for the daughter and a description of the property. When the old gentleman arrived, he was informed of the new arrangement and, upon his understanding that it would have the same effect as the making of wills, he consented to the new plan.

The main controversy arises over what occurred in the attorney's office. The respondents say they thought the new arrangement was the same as the old; that they could still retain possession and control over the property. It was their understanding that it was another way of making a will, and to use the language of the record, the old gentleman thought "if he wanted to break the will, he just threw it in the fire; he didn't mean to give it for all time." It is also testified to that they were informed by the attorney that they could still sell the land at any time and put the money in the bank.

There can be little doubt from reading the record that the old people executed these deeds and leases under the intention and understanding that they were making a testamentary

disposition of their property, and that they had no comprehension of the true character of the situation as expressed in the papers they executed. There can be little doubt that, on account of their lack of knowledge and their poor understanding of the meaning and effect of the terms employed in this involved transaction, they had no adequate conception of the nature and consequence of their act. They thought they were executing wills and as soon as they understood the real nature of the transaction, they repudiated it, refused to recognize the leases, or to accept a division of the crop upon the terms set forth in the lease. They neither comprehended, nor were they capable of comprehending, the nature and consequence of their act. They would not believe their daughter when she attempted to explain it to them, and finally came to a true understanding of the transaction in accepting the judgment of an attorney in whose opinion they had confidence. No citation of authority is necessary to show that equity will avoid conveyances executed under such circumstances, as they lack the first element of an enforceable contract, "the meeting of minds."

Appellants complain of error of the court in not permitting the attorneys who drew up the papers to testify to all that occurred in their presence, upon the ground that it was privileged. If the record sustained this assignment it would be error, as under the circumstances there was no privilege. A client cannot testify to what occurred between himself and an attorney, and then prevent the attorney from giving evidence upon the ground of privilege. The client in giving his testimony has robbed the transaction of the essential element of confidential communication, by voluntarily disclosing it; he himself has broken the seal of the privilege and cannot restore it. *Hall & Paulson Furniture Co. v. Wilbur*, 4 Wash. 644, 30 Pac. 665; *Hunt v. Blackburn*, 128 U. S. 464.

There were two attorneys present at the time, and both testified. One detailed the conversation he had with respond-

ents, what they said to him, what he said to them, how they wanted the property divided, and how he suggested it could be done; that the papers were carefully read and explained to all present by his partner and by Guy Sanpair, and that the respondents appeared to have a perfect understanding of the nature of the instruments and of the transaction. He was asked this question: "Did you explain the nature of and character of the transaction?" to which objection was sustained upon the ground of leading and privilege. It was not error to sustain the objection, it only called for the attorney's conclusion of the effect of what he had previously testified to as having said to the respondents—not only to what he had said but their apparent understanding of what he had said. So that in effect the question had already been answered and it was not error to exclude it.

The other attorney testified that he read all the papers to the parties, and that Guy Sanpair also read each paper to all. Counsel for appellants then offered to show that the transaction, its nature, character, and extent, was thoroughly explained and understood by all, to which objection was made as before and, upon the further ground that it called for a conclusion. If the question was propounded in the language of the offer, it would have been subject to the last objection, and hence properly denied. However, in view of the testimony already given by the partner, its rejection upon any ground would not be regarded by us as reversible error. We fail to see what either of these attorneys could have testified to that was not, except to give their conclusions as to the understanding of the parties, and one of them was even permitted to go as far as that.

The deed to the daughter and the lease of the half conveyed to her are not involved in this appeal, she having consented to the entry of the decree.

Finding no reversible error, the judgment is affirmed.

Rudkin, C. J., Chadwick, Gose, and Fullerton, JJ., concur.

[No. 8476. Department Two. March 2, 1910.]

# SIMEON G. EDMONDS *et al.*, *Respondents*, v. T. G. EUBANKS, *Sheriff of Franklin County et al.*, *Appellants*.[1]

CHATTEL MORTGAGES—FORECLOSURE—COSTS—KEEPING HORSES—USE—ACCOUNTING—EVIDENCE—SUFFICIENCY. A mortgagee in possession of the mortgaged property as custodian of the sheriff, who uses and works the same pending a contested foreclosure, is not entitled to be paid for care and keep anything more than the actual costs less what the property had earned, as shown by an accounting; and he impliedly admits the use of the property as alleged and fails to make the accounting contemplated by law, where, in answer to an affidavit that the property, twenty-five head of horses and farm machinery, had been worked and used by him upon his farm for his own use and benefit, and that the work and labor of the horses and the use of the machinery exceeded the cost of keeping and caring for the property, he merely filed a brief answering affidavit to the effect that it became necessary to employ a man to care for the horses and that the amount paid to him by the sheriff was actually expended incident to said care and keep over and above all offsets by reason of the value of the use of any of the stock and property; the sheriff making no showing except by an item in his expense bill of $2,902 paid for care and keep for 11½ months.

Appeal from an order of the superior court for Franklin county, Neal, J., entered May 18, 1909, retaxing the costs in an action to foreclose a chattel mortgage. Affirmed.

*Lovell & Davis* and *L. L. Long*, for appellants.

*Herman Murray* and *C. L. Holcomb*, for respondents.

DUNBAR, J.—The respondents executed to E. T. Juvenal certain notes amounting to several thousand dollars, and to secure the same gave a chattel mortgage on certain personal property, consisting principally of horses and farm implements. The mortgagor elected to foreclose the mortgage by sale, as provided in the statute. Afterwards the mortgagees came in and asked to have the cause transferred to the supe-

[1]Reported in 107 Pac. 387.

rior court, denying that the notes were due. The cause was so transferred, and finally a judgment was rendered against the respondents here in the sum of $5,596.50, with costs, etc.; and under such judgment the mortgaged property was sold, the sheriff having been placed in possession of the property at the time of the attempt to sell under the statutory provision. After a sale and the confirming of the same, the sheriff made his report to the effect, in brief, that he had sold the property for the sum of $4,100; that he immediately applied such part of said sum as was necessary to the payment of the costs incurred in the said proceeding, paid the sum of $500 to E. T. Juvenal for Lovell & Davis, as attorney's fees as provided in the judgment and decree, and turned over the balance of $685.25 to E. T. Juvenal, the judgment creditor in the said judgment; concluding as follows:

"That a true and correct statement of the sheriff's costs herein is as follows: Expense of keeping and caring for property for 11½ months.....$2,902.00
"Costs of advertisement and sale..... 12.75

Total.....$2,914.75."

Thereupon the respondents in this case, the mortgagors in the original case, moved the court to retax the costs by striking therefrom the expense for caring for the property for eleven and one-half months in the amount of $2,902, and asking that the sheriff be ordered by the court to apply the sum of $2,902 towards the satisfaction of the mortgage debt for which the property was sold. This order was granted by the court, and from such order this appeal is taken.

A great many alleged facts are set forth and discussed in the briefs which it is not discoverable from the record are pertinent to the issues in this case, and we will therefore not discuss them. Passing, without deciding, the technical questions raised by the respondents' motion to dismiss this appeal, and proceeding to the merits of the case, we are of the opinion that the court was justified in making the order which

it did. The case was tried, according to the certificate of the judge, upon the affidavits of the respondents, the affidavit of the appellant Juvenal, and of the attorneys for the respondents and appellants. All the affidavits which are pertinent to the issues are those of the respondents Simeon G. Edmonds, Harry Edmonds and Frank Edmonds, and of the appellant E. T. Juvenal.

The respondents Edmonds testified that the sheriff had not been to any expense in keeping the property, which was about twenty-five head of horses and some farm machinery, but that said property had been placed by the sheriff in the possession of appellant Juvenal, the mortgagor, and that during the entire time subsequent to the turning over to him by the sheriff he had worked and used the said mortgaged property, and used the same for his own use and benefit, using it as his own in the operation of his farming business, using both the stock and the harvesting machinery for that purpose, and so continued to up to the final sale of the property under the decree of foreclosure; that the work and labor of the horses and the use of the machinery was far in excess of the cost of keeping and caring for the same, and that the use of said mortgaged property was with the full knowledge and consent of the appellant Eubanks, and that the sheriff Eubanks never paid out the sum of $2,902 for the care and keeping of said property, nor any sum whatever.

The affidavit of attorney Davis is not pertinent to the issue, going simply to the question of who was to blame for the procrastinations in the final determination of the case. In answer to the affidavits of the respondents, there is a brief affidavit from E. T. Juvenal, to the effect that the property mortgaged was turned over to him as custodian by the sheriff; that he kept the same for a year and a half; that it was necessary to employ a man to care for and look after the personal property and feed the live stock, and that the bill of costs of $2,902, which was paid by the sheriff of Franklin county

for the care and keeping of the said personal property, was actually expended incident to said care and keeping, over and above all offsets by reason of the value of the use of any of said stock or personal property.

The court recites in the statement of facts that it was admitted that the person appointed as custodian of the mortgaged property was, at all times during which he was the nominal custodian, the hired hand of the defendant Juvenal, and working for the said defendant Juvenal as a farm hand upon the farm of the said Juvenal, with the said mortgaged property and horses and other horses and personal property belonging to the said Juvenal, and using all of said personal property, both the mortgaged personal property and the individual property of the said Juvenal, indiscriminately in the work upon said farm. The sheriff made no showing whatever other than the report to which we have above referred, and we do not think that the affidavit of Juvenal was sufficient to overcome the allegations made by the respondents that the use of the property was equivalent to, or in excess of, the expenses of keeping the same. Probably the most that could be said in favor of Juvenal was that he was a mortgagee in possession of the mortgaged property, the possession of which he would have a right to take to preserve his interests if it would be obtained peaceably, and all that he would be entitled to as such mortgagee in possession would be the actual cost of the keeping of the property as shown by an accounting. But, as is shown by his affidavit in this case, there was no attempt to make an accounting. There is an implied admission that he used the property as alleged in the affidavits of the respondents, but he is content with the announcement that the $2,902 which was returned as costs of the sheriff was paid by the sheriff for the care and keeping over and above all offsets by reason of the value of the use of any of the said stock. This is not such an accounting as the law contemplates, especially in answer to the allegations of

the complaint made by the respondents in moving for a retaxation of costs.

The judgment will therefore be affirmed.

RUDKIN, C. J., CROW, PARKER, and MOUNT, JJ., concur.

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[No. 8434. Department One. March 2, 1910.]

PEARL OYSTER COMPANY *et al.*, *Respondents*, v. MYRON T. HEUSTON *et al.*, *Appellants*.[1]

PUBLIC LANDS — TIDE LANDS — DEFINITION — BOUNDARIES. Tide lands, proper, are those lying between the lines of ordinary high tide and mean low tide, the law accepting the mean and not the extreme where boundaries are concerned.

SAME—STATUTES—CONSTRUCTION. There is no conflict between Rem. & Bal. Code, § 6641, defining tide lands and § 6744 dividing all tide lands into two classes with reference to the location of the boundaries of cities and towns.

PUBLIC LANDS—TIDE LANDS—STATE DEED—CONSTRUCTION. A state deed of all tide lands situate in front of, adjacent to, or abutting upon, certain portions of the government meander line particularly described, extends only to the line of mean low tide, under Rem. & Bal. Code, § 6641, defining tide lands as those over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide; especially as a grant by a state is to be construed most strongly against the grantee, and restricted to the narrowest limits that will reasonably satisfy the grant if no limit is fixed by the deed.

PUBLIC LANDS—OYSTER LANDS—SALE—APPLICATION—INTEREST OF OBJECTORS. The grantee of tide lands extending only to mean low tide has no interest entitling him to object to a state sale of oyster lands lying below the line of mean low tide; since only the state can question the right of another to purchase such lands.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered August 9, 1909, reversing, on appeal, a decision of the board of state land commissioners

[1]Reported in 107 Pac. 349, 832.

in which the board granted an application to purchase oyster lands. Reversed.

*The Attorney General* and *T. W. Hammond*, for appellants.

*Troy & Sturdevant* and *Hadley, Hadley & Abbott*, for respondents.

RUDKIN, C. J.—On the 24th day of October, 1907, Myron T. Heuston, J. S. Ferguson, Louise Heuston, Ida Peters, M. A. Riley, Herman Martin, and Edward F. Fay, filed in the office of the commissioner of public lands of this state their several applications to purchase certain tide lands of the second class in Skagit county, as oyster lands. Notice of the applications was published as prescribed by law, and within the time limited by law, the Lake Whatcom Logging Company, the Pearl Oyster Company, the Oyster Creek Oyster Company, and one J. J. Cryderman protested against the allowance of the applications, claiming that the tide lands applied for had theretofore been conveyed by the state to Cryderman and others. A hearing was thereafter had on the applications and the protests, before the board of state land commissioners. The board found that the lands applied for were below the line of mean low tide, and granted the applications. From this order an appeal was taken to the superior court of Skagit county, and from the judgment of that court, reversing the order or decision of the board of state land commissioners, the present appeal is prosecuted.

Prior to the filing of the applications to purchase the oyster lands, the state had conveyed to Cryderman and others all tide lands of the second class owned by the state situate in front of, adjacent to, or abutting upon certain portions of the government meander line particularly described in the state deeds. The lands applied for by the appellants are situate in front of and adjacent to the meander line thus described, but below the line of mean low tide. On the foregoing facts the appellants contend that the lands below mean

low tide are subject to sale as oyster lands, while the respondents contend that such lands are included within their deeds; but, if not so included, are not subject to sale as oyster lands or otherwise. The case thus presented calls for a consideration and construction of the laws of this state relating to the classification and sale of tide lands.

In the absence of legislative definition or judicial decision, one's first conception of tide lands would be the body of land covered and uncovered by the flow and ebb of the ordinary tides. Lands above the line of high tide are not tide lands, nor are lands entirely submerged or covered by water. When a stream or other body of water forms a boundary line, whether the boundary be high or low water mark, the law accepts the mean and not the extreme, so that tide lands proper lie between the lines of ordinary high tide and mean low tide. This has been the judicial construction of the term tide lands. *People v. Davidson*, 30 Cal. 379; *Andrus v. Knott*, 12 Ore. 501, 8 Pac. 763; *Walker v. State Harbor Comr's*, 17 Wall. 648. Such also was the view of this court in the case of the *State ex rel. McKenzie v. Forrest*, 11 Wash. 227, 39 Pac. 684, which will be referred to later in this opinion.

The first act of the state legislature, relating to the subject of tide lands, was the act of March 26, 1890, Laws of 1889-90, p. 431. Section 4 of the act classified tide lands with reference to their location and condition, but did not attempt to otherwise describe or define them. That duty devolved upon this court in a measure in the case of *State ex rel. McKenzie v. Forrest, supra.* It was there held that tide lands of the first class extended beyond or below the line of mean high tide to the inner harbor line. This was admittedly a forced construction of the tide land act to avoid the public inconvenience and mischievous consequences that would result from leaving "an irregular uncertain strip lying between the low tide line and the inner harbor line." This

is apparent from the opinion in the case and especially the closing paragraph, which reads as follows:

"The argument and contentions of the relators, which we have largely set forth herein, should be sustained, even though the term in question must receive a different and more limited meaning as to tide lands of the third class. We are of the opinion that said act as to tide lands of the first class, when construed in the light of the policy of the state with reference to its harbors, is capable of being, and should be, construed as if it had incorporated therein a proviso to the effect that as to tide lands of the first class the same should extend to the inner harbor line, and that by the establishment of harbor reserves *the line of low tide* is arbitrarily fixed as coincident with the inner harbor line, and that all lands lying within such inner harbor line and the high tide line were fairly designated as intervening tide lands. This contention will harmonize said act with the constitution and will be consonant with the policy of the state as to preserving and improving its harbors . . . . and will establish an orderly and uniform plan and system of dealing with these lands; and the other construction would create infinite confusion and disorder."

That case was decided February 19, 1895, and within less than a month thereafter the legislature passed the act of March 26, 1895, Laws of 1895, p. 527, section one of which defined tide lands in almost the exact language of this court. That section reads as follows:

"That for the purpose of this act all lands belonging to and under the control of the state shall be divided into the following classes: . . . (2) Tide lands: All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, except in front of cities where harbor lines have been established or may hereafter be established, where such tide lands shall be those lying between the line of ordinary high tide and the inner harbor line, and excepting oyster lands." Rem. & Bal. Code, § 6641.

The above section was reenacted as section four of the act of March 19, 1897, Laws of 1897, p. 280, under which the tide lands claimed by the respondents were sold and conveyed. If the deeds under which the respondents claim are limited

and confined to tide lands as thus defined, it seems too plain to admit of argument or discussion that nothing passed by the deeds beyond the line of mean low tide. The respondents contend, however, that when section four is construed in connection with section thirty-nine of the same act, it becomes apparent that the legislature intended to make plenary provision for the sale and disposal of all of its tide lands, whether above or below mean low tide.

Section thirty-nine reads as follows:

"The tide and shore lands of the state of Washington, which are not reserved from sale by the constitution and laws of the state, shall be divided into two classes:

"(1) Tide and shore lands of the first class, which shall comprise all tide and shore lands within or in front of the limits of any incorporated city or town, or within two miles thereof on either side, including submerged lands lying between the line of mean low tide and the inner harbor line, wherever harbor lines have been established or shall be established.

"(2) All tide and shore lands in the state not included in the above class shall be known as second class tide and shore lands, and shall be leased and sold as in the manner provided in this act." Rem. & Bal. Code, § 6744.

We see no conflict between these two sections. The first defines tide and shore lands, while the second provides for their sale and lease. Tide lands within the purview of section thirty-nine are the tide lands defined in section four. Indeed, if section four did not exist at all the same conclusion would follow, for as already stated submerged lands below the line of mean low tide are not, strictly speaking, tide lands at all. Other provisions of the different tide land acts lead to the same conclusion. Under the act of 1890, tide lands were described by metes and bounds, so that state deeds specifically described the lands conveyed; while under the act of 1897, such lands are only described by reference to the government meander line. Under the latter act the boundary on the water side is not fixed at all, unless fixed at the line of mean low tide as defined by section four. If the tide lands claimed

by the respondents are not bounded or limited by the line of mean low tide, we are at a loss to know where the true boundary is. Is it the line of extreme low tide, the middle of the sound, mid-ocean, or the opposite shore? If it required a forced construction of the statute and a legislative decree to extend tide lands of the first class to the inner harbor line, to what point does the respondents' title extend, under a fair and reasonable construction of the law?

Again, every grant by a sovereign state is construed most strongly against the grantee. Nothing passes by intendment or implication. And if the law or the state deed fixes no limit to a grant, it becomes the duty of the courts to fix the narrowest limit that will reasonably satisfy the terms of the grant. For these reasons we have no hesitation in saying that the tide land grant to the respondents and their predecessors in interest did not extend beyond the line of mean low tide. We are told such a construction of the law at this time will disturb titles and work irreparable injury to the purchasers of tide lands, but with that question the courts have little or no concern. We find nothing in the legislation of this state to give color to the respondents' present claim. Nor is the claim supported by any prior decision of this court. We have already referred to the case of the *State ex rel. McKenzie v. Forrest*, *supra*, and the question now presented was not involved in the later case of *Welsh v. Callvert*, 34 Wash. 250, 75 Pac. 871. In that case the relator attempted to purchase tide lands above the line of mean low tide which were confessedly included in the respondents' deeds, on the ground that the tide land deeds did not include oyster lands. This court held that the character of the land was determined by the proper officer of state before the deed issued, and that the state deed could not be collaterally attacked. No question as to the limits of the respondents' grant was before the court or referred to in the opinion. All parties to the controversy conceded that the lands applied for were within the grant to the respondents and such was manifestly the case.

No other decision of this court has been cited, and we are not advised that the administrative officers of the state have placed a different construction on the law. Indeed, we cannot readily see how such officers could be called upon to construe this branch of the law at all, for the state deed simply described the tide lands by reference to the meander line, and their limits and boundaries in other respects are fixed by operation of law, and not by any act of the department. If, therefore, the respondents and others have been misled, or have placed a different construction on the law, it is perhaps because it was to their interest to be misled or to construe the law to their own advantage.

It is lastly contended that if the lands in controversy are not included in respondents' deeds, because not tide lands of the second class, they are for the like reason not subject to sale as oyster lands. We do not feel called upon to decide that question at this time. If the respondents have no interest in or claim to the lands, they have no standing before the board of state land commissioners, or on appeal to the courts. The question is solely one between the state and the appellants with which we are not at present concerned.

The cases were all submitted to the court below under a stipulation, reserving certain questions for trial and decision in the event the court should rule that the lands applied for were not included in the deeds under which the respondents claim. To the end that this stipulation may be given effect, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

CHADWICK, FULLERTON, GOSE, and MORRIS, JJ., concur.

## ON PETITION FOR REHEARING.

[Decided March 29, 1909.]

PER CURIAM.—In the opinion heretofore filed we held that the respondents had no title to the tide lands claimed by them lying below the line of mean low tide, and declined to pass upon the right of the appellants to purchase such tide lands

as oyster lands. It is earnestly insisted, in a petition for rehearing, that the latter question was properly before the court and should have been decided. The failure of the court to decide the question thus presented was not an oversight, but a decision of it would or might affect the rights of parties not before the court who have obtained patents from the state, and it would be an injustice to them to decide a question of such magnitude at the instance of parties who are at best only trespassers on state property. The rehearing is therefore denied.

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[No. 8572. Department Two. March 2, 1910.]

## THE STATE OF WASHINGTON, *Respondent*, v. F. W. D. MAYS, *Appellant*.[1]

APPEAL—REVIEW—ERRORS CONSIDERED—CORRECT DECISION BASED ON ERRONEOUS GROUND. Upon an assignment of error in rejecting an offer of proof, which was not broad enough in some particulars, error of the court in rejecting the offer upon another specific ground will be reviewed on appeal, where any change in the form of the offer would have been unavailing to appellant.

LIBEL AND SLANDER—CRIMINAL PROSECUTION—DEFENSES—TRUTH OF CHARGE—COMMON LAW. At common law, which prevails in this state except as modified by statute, the truth of a libelous charge was not a defense to a criminal prosecution.

SAME — STATUTES — EVIDENCE OF TRUTH—ADMISSIBILITY. Under Rem. & Bal. Code, § 2157, providing that the truth of a criminal libel may be given in evidence, and the accused shall be acquitted if the jury find that the matter charged was a crime punishable by fine or imprisonment, and was true, and published with good motives and justifiable ends, the truth is available as a defense only where such a crime was charged with good motives, etc.; and the right to give evidence of the truth is limited to such cases.

SAME—"DEFAMATION"—FALSITY OF CHARGE. "Defamation" as used in Rem. & Bal. Code, § 2777, defining criminal libel does not imply that the defamatory words are false, as the statute is simply declaratory of the common law in which the truth of the charge was no defense.

[1]Reported in 107 Pac. 363.

Appeal from a judgment of the superior court for Garfield county, Miller, J., entered October 24, 1908, upon a trial and conviction of criminal libel. Affirmed.

*Cain & Hurspool*, for appellant.

*E. V. Kuykendall*, for respondent.

RUDKIN, C. J.—The appellant was convicted of the crime of libel, and prosecutes this appeal from the judgment and sentence of the court. The prosecution was based on the following article written by the appellant and published with his knowledge and consent in a newspaper, of which one Fitzmaurice was publisher and proprietor:

"A NOTORIOUS STOCK RUSTLER.

"One H. C. Benbow recently made a savage attack on this paper through the columns of his paper at Dayton, and wrote defamatory letters over the state to injure our business.

"We regret to be forced in self-defense to inform the public of the unsavory reputation said Benbow had at one time in Garfield county. It is known to all the oldtimers that stockrustling became so flagrant at one time in this section that a vigilance committee was organized to break it up and Mr. Benbow was accused of being a ringleader in the band of rustlers. Some of them fled the country and friends intervened to save Benbow, as he was young then.

"It illy becomes him to assail others, with his past record. He accused Hon. J. H. Schively of robbing an insurance company, and asked the people to vote against him and Sam Nichols, both of whom led their tickets, owing to the advocacy of them by this paper."

At the trial of the case the appellant offered to prove,

"That the said H. C. Benbow at one time had an unsavory reputation in said Garfield county. That it is known to all the oldtimers that stock rustling became so flagrant at one time in this section that a vigilance committee was organized to break it up, and said Benbow was accused of being a ringleader in the band of rustlers. That some of them fled the country and that friends intervened to save Benbow as he was young then."

To this offer the respondent objected, and the objection was sustained, for the reason that the publication complained of did not charge the prosecuting witness Benbow with a crime punishable by fine or imprisonment under the law of this state. The ruling of the court excluding the proffered testimony is the basis of the principal assignment of error on this appeal. The respondent contends that the ruling of the court below should be sustained for the following reasons: First, because the offer of proof did not extend to all the libelous matter contained in the publication; second, because the offer was not preceded by proof that the publication was made with good motives and for justifiable ends; and third, because it was incumbent on the appellant to prove not only that the prosecuting witness had been accused of being a ringleader in a band of stock rustlers, but that he was such in fact. Doubtless the offer was not complete in itself, and was not broad enough to constitute a defense to the charge, but it would be unfair to the accused to sustain the ruling of the court below on that ground. Had the court sustained the objection on any of the grounds now suggested by the respondent, the appellant might have conformed to the ruling of the court by modifying or changing his offer; but when the court rejected the proffered testimony on the broad ground that the prosecuting witness was not charged with a crime punishable by a fine or imprisonment under the law, any change in the form of the offer would be unavailing. We therefore deem it our duty to determine the correctness of the ruling complained of on the ground on which it was based in the court below.

Whatever differences of opinion may have heretofore existed, it is now very generally conceded that the truth of the libelous charge was no defense to a criminal prosecution at common law. 18 Am. & Eng. Ency. Law (2d ed.), p. 1068; 25 Cyc. 573; 4 Blackstone, Commentaries, p. 150; 2 Wharton, Criminal Law (10th ed.), § 1643. And the com-

mon law prevails in this state except as modified by statute. Rem. & Bal. Code, § 2157 provides as follows:

"In prosecution for libel, the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libelous was a crime punishable by a fine or imprisonment, and was true, and that the same was published with good motives and justifiable ends, the defendant shall be acquitted."

This section is not entirely free from ambiguity. It might be inferred from the first part of the section that the truth of the libelous charge may always be given in evidence, but the latter part shows very clearly that the truth of the charge is only available as a defense where the matter charged as libelous was a crime punishable by fine or imprisonment, and the same was true, and was published with good motives and for justifiable ends.

The law of libel underwent many radical changes in the early part of the nineteenth century. Some of the earlier state constitutions provided that in all prosecutions for libel the truth might be given in evidence, and if it appeared that the matter charged as libelous was true and was published with good motives and for justifiable ends, the defendant should be acquitted. Others limited the right to prove the truth of the charge to prosecutions for publications respecting the official conduct of the men in public capacity, or the qualification of those who were candidates for the suffrages of the people, or where the matter published was proper for public information. A reference to many of these constitutional provisions will be found in the note to *People v. Croswell*, 3 Johns Cas. (N. Y.) 337. Our attention has not been directed to any constitutional or statutory provision like the above, but it seems clear to us that the right to give evidence of the truth of a libelous charge is limited to cases where the charge was a crime punishable by fine or imprisonment, and it is conceded that the case at bar does not fall within that class.

Counsel for appellant ingeniously argue that our statute defines libel as "the defamation of a person made public," etc., (Rem. & Bal. Code, § 2777); and that "defamation" is defined as, "a false publication calculated to bring the person defamed into disrepute." The word "defamation" as here used does not necessarily imply that the defamatory words are false. Our statutory definition of libel is simply declaratory of the common law. Blackstone defines libels as "malicious defamations of any person, and especially as magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath or expose him to the public hatred, contempt, and ridicule." 4 Blackstone, Commentaries, p. 150. The same author says that the truth is no defense to a charge of this kind; so that, if counsel for appellant are correct, we have the anomaly that libel is a false charge, but the prosecution is not required to prove its falsity, and the defense it not permitted to prove its truth. Since this case arose, the libel law has been changed by the new criminal code and the question now presented will perhaps not arise again, so that a further discussion would be unprofitable.

We will add in conclusion, however, that we can conceive of no justification for the publication of such an article under the circumstances disclosed by the record. As said by a learned writer on criminal law:

"It is the interest of the community that old offenses in most cases should be forgotten. There are few men, no matter how valuable their services ultimately to society, who might not have been ruined, if at the turning point of their lives they had been visited by the publication of youthful wrongs done by them. Hence he who maliciously explores the past life of an intended victim, with the purpose of crushing him by bringing to public notice some act of shame, long past, it may be long repented of and condoned, may deserve a severer punishment than one who invents a false charge, easily disproved. In the former case, the injury inflicted by the libeler is far more destructive than in the latter. Even should the truth, under the statutes, be admissible, yet unless

on public grounds it ought to have been published, it is no defense. And when the statutory condition is that the publication be with good motives and for good ends, if these requisites be not shown, the truth should be rejected." Wharton, Criminal Law (9th ed.), § 1645.

The judgment of the court below is affirmed.

DUNBAR, PARKER, MOUNT, and CROW, JJ., concur.

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[No. 8565. Department One. March 3, 1910.]

HARRY KINNEY, *Appellant*, v. JAMES McCALL *et al.*, *Respondents*.[1]

TRUSTS—EXPRESS TRUST—PAROL EVIDENCE. A deed absolute in form, but in trust for the grantors, is an express trust which cannot be proved by parol evidence.

TRUSTS—ESTABLISHMENT—EVIDENCE—SUFFICIENCY. The evidence to establish a trust must be clear and satisfactory, and is insufficient where the only witnesses were one of the original grantors and the grantee, both aged and infirm and deficient in memory, and parts of their testimony tended to establish a trust in favor of the grantor and his wife while other parts tended to establish a trust in favor of the wife and children, made more than nineteen years ago, which trust they as participants had breached at that time.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—RECORDS—NOTICE—SECRET TRUST. The fact that recorded deeds in the chain of title to secret trustees recited only a nominal consideration, is not notice of the secret trust, and does not affect the rights of a *bona fide* purchaser for full value, where the deeds had been recorded and unquestioned for several years.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered October 4, 1909, upon findings in favor of the defendant, dismissing on the merits an action to declare a trust and for an accounting. Affirmed.

*William T. Stoll*, *O. C. Moore*, and *Chas. P. Lund*, for appellant.

*Danson & Williams*, for respondents.

[1]Reported in 107 Pac. 385.

RUDKIN, C. J.—On the 12th day of August, 1890, William A. Kinney and Emma Kinney, his wife, conveyed lot 6, of block 9, of Havermale's addition to the city of Spokane Falls, lots 1 and 2, of block 14, of Fairview addition to the city of Spokane Falls, and an undivided one-half interest in the west half of lot 3, of block 9, of the Resurvey and Addition to the city of Spokane Falls, to Lide Gonder, by warranty deed. The deed recited a consideration of five dollars, and that the lot in Havermale's addition was subject to a mortgage of $2,000, and the half lot in the Resurvey and Addition to a mortgage of $3,500. On the 23d day of December, 1890, William A. Kinney died, intestate, leaving as his only heirs at law a son, Harry Kinney, the plaintiff in this action, now of the age of twenty-four years, and a daughter, Grace Kinney, now Grace Williams, of the age of twenty-eight years. On the 18th day of January, 1891, Gonder mortgaged the lot in Havermale's addition to the Pennsylvania Mortgage and Investment Company to secure a loan of $3,000; and on the 29th day of January, 1891, reconveyed to Emma Kinney by warranty deed all the property described in the first mentioned deed. This deed also recited a consideration of five dollars, and that the lot in Havermale's addition was subject to a mortgage of $3,000, and the half lot in the Resurvey and Addition to the same mortgage of $3,500. On the 24th day of January, 1894, Emma Kinney again mortgaged the lot in Havermale's addition to the Pennsylvania Mortgage and Investment Company, to secure a loan of $3,275. This latter mortgage was thereafter assigned by the mortgagee to one Wilson as trustee for certain persons whose names are not material to our present inquiry. On January 13, 1896, Mrs. Kinney conveyed the lot in Havermale's addition to Wilson as trustee, by warranty deed, the deed reciting a consideration of $25, and that the lot was subject to a mortgage of $3,275, with accrued interest, and certain taxes. On May 7, 1903, Wilson and wife conveyed by warranty deed to the defendant James E. McCall, the deed reciting a consideration

of $4,750. McCall and wife mortgaged the lot to one Sivyer to secure a loan of $6,000, and made improvements on the property to the value of $2,700. Thereafter McCall and wife agreed to convey the property to the defendant Spokane Sash & Door Company, a corporation.

The complaint alleged that the original conveyance to Gonder was made in trust for the use and benefit of the grantors, William A. Kinney and wife; that, upon the death of William A. Kinney, the plaintiff and his sister became the owners of an undivided one-half interest in the property; that the sister conveyed her interest to the plaintiff; and prayed judgment for a recovery of the property, and for an accounting of the rents and profits. The court below found, among other things, that the defendants were purchasers in good faith, without notice, and dismissed the action. From the judgment of dismissal, this appeal is prosecuted.

There are three all-sufficient reasons why this judgment should be affirmed. First, because the evidence offered by the appellant to establish a trust in his favor was incompetent for that purpose; second, because the evidence, if competent, was insufficient; and third, because the respondents are bona fide purchasers.

(1) The conveyance to Lide Gonder was absolute in form, and if there was a trust in favor of the grantors, or in favor of Mrs. Kinney, or in favor of Mrs. Kinney and the children, it was an express trust and could not be proved by parol. *Spaulding v. Collins*, 51 Wash. 488, 99 Pac. 306. The wisdom of the rule excluding parol testimony in such cases was never better illustrated than in the case at bar.

(2) A trust must be established by clear and satisfactory proof, and the evidence in this case falls far short of that requirement. The complaint alleged that the original conveyance was made for the use and benefit of the grantors in the deed, but there was no testimony tending to sustain the allegation. The two witnesses offered to sustain the complaint were Mrs. Kinney, the surviving grantor, and Lide Gonder

the grantee. Parts of their testimony tended to show that a trust was created in favor of Mrs. Kinney, while other parts tended to establish a trust in favor of Mrs. Kinney and the children. The testimony is uncertain and unsatisfactory in the extreme. The witnesses are advanced in years, and are infirm in both body and mind. They repeatedly admitted that their memories were failing, and that they could not recollect. Mrs. Kinney could not remember when she was married or when she came to Spokane, and yet the appellant, by such testimony, seeks to establish a trust in real property, arising out of a conveyance made more than nineteen years before the trial. If there was such a trust, the participants were guilty of a breach of that trust when the property was conveyed absolutely to Mrs. Kinney in the year 1891. They have not only defrauded the children, but have perpetrated a like fraud on subsequent purchasers of the property. If such were the case, their testimony should be viewed with suspicion and scrutinized with care. But we do not think for a moment that such was the case. We think it far more likely that these two women carried out and respected the wishes of the deceased, in the conveyance made soon after his death, than that the present claims of the appellant have the slightest foundation in fact. The court below found that the trust was in favor of Mrs. Kinney alone, but its conclusion was manifestly based on the probabilities of the case and the circumstances surrounding the parties at the time, rather than upon any testimony found in this record.

(3) A person who purchases property for a nominal or grossly inadequate consideration is not a bona fide purchaser, and one who purchases from such a purchaser with notice stands in his shoes; but a purchaser of real property is not bound to compare the consideration recited in every deed in his chain of title with the market value of the property at the time of the several conveyances, under penalty of having the property impressed with a secret trust in his hands. If such a rule were sanctioned by the courts, no per-

son could safely purchase, hold or deal in lands. In *Babcock v. Collins*, 60 Minn. 73, 61 N. W. 1020, 51 Am. St. 503, it was contended that an executor's deed, reciting a nominal consideration of $1 was void, and that a subsequent purchaser of the property was put upon inquiry by its registration, but in answer to this contention the court said:

"The deed purports to have been executed in consideration of one dollar, and it is urged by appellants that for this reason it is void on its face, being made by trustees in their representative capacity. Whatever might be said as to such a deed, if it appeared that the property attempted to be conveyed by it was at the time valuable, and parties interested had promptly repudiated it, this is not such a case. This deed was made for a one-tenth interest in eighty acres and two government lots. It might have been a partition deed, which the parties interested had procured or ratified. This deed was recorded in 1877, and remained of record unquestioned thereafter until this action was brought. Conceding, without deciding, that the nominal consideration expressed in it was a sufficient circumstance, for some reasonable time after it was made and recorded, to put a purchaser on inquiry, that time has long since passed. After it had remained of record for some years unquestioned, a person about to purchase under it had a right to conclude that there was no vice in the deed; that a sufficient consideration had, in fact, been paid, or it would have been attacked within a reasonable time; and he was justified in relying upon it. It is not claimed that these defendants had any knowledge that there was any fraud in the transaction, unless the face of the deed was sufficient to put them on their guard, and we are of the opinion that after such reasonable time it was not."

The judgment of the court below is affirmed.

CHADWICK, FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8215. Department Two. March 3, 1910.]

KALB-GLIBERT LUMBER COMPANY, *Respondent*, v. W. S. CRAM *et al.*, *Appellants*, H. E. OLSON *et al.*, *Defendants*.[1]

ESTOPPEL—CONDUCT—JUDICIAL PROCEEDINGS—OBJECTION TO JURISDICTION. In an action to foreclose a materialman's lien upon a vessel, sureties who sign a bond offered for the purpose of releasing the vessel from the custody of a receiver and agree in the bond that their personal liability shall stand as security in place of the vessel in case the vessel is released, are estopped to assert that the order of the court, as prayed for, releasing the vessel was without jurisdiction and not authorized by statute.

ACTIONS—PARTIES—SURETIES ON BOND — JUDGMENTS — CONSTITUTIONAL LAW—DUE PROCESS—LIENS—FORECLOSURE. Where, in an action to foreclose a materialman's lien upon a vessel in the hands of a receiver, the vessel is released from custody upon defendant's substituting a bond wherein the sureties agree that their personal liability thereon shall become substituted for any security or claim which the plaintiff may have against the vessel, and that they are substituted for and take the place of the vessel, the sureties become parties to the action to the extent that, upon default of the defendant, personal judgment may be rendered against them in the original cause, without violating their constitutional right to due process of law, or any principal of law (RUDKIN, C. J., dissenting).

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered February 18, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a lien upon a vessel. Affirmed.

*Chas. E. Miller* and *Robert G. Chambers*, for appellants, contended, *inter alia*, that judgment against the sureties without notice was without due process of law. *Pennoyer v. Neff*, 95 U. S. 714; *Shove v. Manitowoc*, 57 Wis. 5, 14 N. W. 829; *Philadelphia v. Miller*, 49 Pa. St. 440; *Harwood v. North Brookfield*, 130 Mass. 561; *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474; *Cummings v. Stark*, 138 Ind. 94, 34 N. E. 444; *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 433, 24

[1]Reported in 107 Pac. 381.

N. E. 83; *United States v. American Lumber Co.*, 80 Fed. 309; *Davidson v. New Orleans*, 96 U. S. 97; *Peerce v. Kitzmiller*, 19 W. Va. 564; *Burns v. Multnomah R. Co.*, 8 Sawyer (U. S.) 543; *St. Louis v. Richeson*, 76 Mo. 470; *Louisville & N. R. Co. v. Nash*, 118 Ala. 477, 23 South. 825, 72 Am. St. 181, 41 L. R. A. 331; *St. Clair v. Cox*, 106 U. S. 350; *Freeman v. Alderson*, 119 U. S. 185; *Scott v. McNeal*, 154 U. S. 34. The proceeding was *in rem* and there could be no personal judgment. *Dewey v. Des Moines*, 173 U. S. 193; *Thormann v. Frame*, 176 U. S. 350; *Bates v. Delavan*, 5 Paige Ch. 299; *Heidritter v. Elizabeth Oil-cloth Co.*, 112 U. S. 294; *Boswell's Lessee v. Otis*, 9 How. 336; *Stone v. Myers*, 9 Minn. 303, 86 Am. Dec. 104.

*Welsh & Welsh*, for respondent, contended, among other things, that the bond took the place of the vessel, estops the sureties, and authorized the court to enter judgment against them in the original cause. *The "Wanata,"* 95 U. S. 600; *United States v. Ames*, 99 U. S. 35; *The Haytian Republic*, 59 Fed. 476; *The Glide*, 72 Fed. 200; *Johnson v. Chicago and Pacific Elevator Co.*, 119 U. S. 388; *Gindele v. Corrigan*, 129 Ill. 582, 22 N. E. 516, 16 Am. St. 292; *Knapp, Stout & Co. v. McCaffrey*, 178 Ill. 107, 52 N. E. 898, 69 Am. St. 290; *Id.*, 177 U. S. 638; *Gordon v. Third Nat. Bank of Chattanooga*, 56 Fed. 790; *The New York*, 104 Fed. 561; *Blossom v. Milwaukee etc. R. Co.*, 1 Wall. 655; *The Winnebago*, 141 Fed. 945; *Delaney Forge and Iron Co. v. The Winnebago*, 142 Mich. 84, 105 N. W. 527, 113 Am. St. 566. The bond expressly substituted the personal liability of the sureties for the vessel. 27 Am. & Eng. Ency. Law (2d ed.), p. 289; *In re Van Orden*, 96 Fed. 86; *Joslin v. New Jersey Car Spring Co.*, 36 N. J. L. 141; *Cline v. Mitchell*, 1 Wash. 24, 23 Pac. 1013; *Carstens v. Gustin*, 18 Wash. 90, 50 Pac. 933; *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004.

MOUNT, J.—John W. Dickie & Son, a California corporation, was engaged in constructing a ship in the city of Ray-

mond, this state, for E. Kruse and E. T. Kruse. The vessel was being constructed on land. The Kalb-Glibert Lumber Company, between the months of July, 1907, and January, 1908, furnished lumber to John W. Dickie & Son of the value of $5,117.66, to be used, and which was used, in the construction of said vessel. All of the lumber was paid for excepting the sum of $1,000. Thereafter the vessel was launched in the Willapa river at Raymond, preparatory to being towed to San Francisco, California. After the vessel was placed in the water, the Kalb-Glibert Company brought this action in the superior court of Pacific county, against H. E. Olson who was in charge and possession of the vessel, and against E. Kruse and John W. Dickie & Son, alleging the furnishing of the material, the use and value thereof, claiming a lien against the vessel for the amount alleged to be due, and praying for a sale of the vessel to satisfy the lien. The complaint also alleged that the defendants were about to remove the vessel from the jurisdiction of this state, and prayed for the appointment of a receiver therefor. Upon this application the court appointed a receiver, who took possession of the vessel. While the vessel was in the possession of the receiver, the defendants filed a petition, asking the court to release the vessel and to substitute a bond therefor in the sum of $1,500. A bond, with W. S. Cram and Frank Rose as sureties thereon, accompanied the petition. Upon the hearing of this application, an order was made which recited, among other things, the following:

"It is further ordered that said bond be approved by the clerk of this court, and that the said action proceed in all manner as though said vessel remained within the jurisdiction of this court, and that said bond and the personal liability of the principals and sureties thereon shall be and become and are substituted for any security or claim which the said plaintiff Kalb-Glibert Lumber Company may have against said vessel 'Doris,' her tackle, apparel, and furniture; and the principals and sureties are hereby substituted for and take the place of said vessel."

The bond was thereupon approved and filed in the case, and the vessel released. The bond contained the usual conditions, and also recited:

"This bond and the personal liability of the principals and sureties thereon shall be and become and are substituted for any security or claim which the said Kalb-Glibert Lumber Company may have against said vessel 'Doris' aforesaid, her tackle, apparel, and furniture, and that said action may proceed in all manner as though said vessel remained within the jurisdiction of the above entitled court, as this bond and the principals and sureties aforesaid are hereby substituted for and take the place of said vessel."

Thereafter the vessel was removed from the jurisdiction of the court and no further appearance was made in the case, and subsequently a judgment was entered against the defendants and the sureties upon the bond for the sum of $1,067, and costs amounting to $25. The sureties upon the bond have appealed from that judgment.

They argue, first, that, after acquiring jurisdiction of the cause, the court must proceed according to the established modes governing the class to which the case belongs. It is then contended that the action was brought under the statute to foreclose a lien, given by Rem. & Bal. Code, § 1182, and that after a receiver was appointed, the court had no jurisdiction to order the vessel released and to substitute a bond therefor, because no such procedure is provided for by statute. If this is the rule, it is clear that the appellants are estopped to raise that question. The defendants in the action petitioned the court to make the order releasing the vessel. The appellants, while not signing the petition, offered their bond in case the petition should be granted, and upon the strength of this petition and offer the order was made. The appellants thereby led the court to make the order for the benefit of the defendants, and cannot now be heard to say that the order was made without jurisdiction, or that by such act the court was deprived of the right to determine the merits of the case.

Appellants also contend that they were not parties to the action, and that the judgment was taken against them without notice and, therefore, without due process of law. It is true that the appellants were not parties originally, but they came into the action voluntarily and submitted themselves to the jurisdiction of the court and agreed that they should become "substituted for any security or claim which the said Kalb-Glibert Lumber Company may have against the said vessel 'Doris' aforesaid, her tackle, apparel, and furniture, and that said action may proceed in all manner as though said vessel remained within the jurisdiction of the above entitled court, and this bond and the principals and sureties aforesaid are hereby substituted for and take the place of said vessel." The order releasing the vessel was made upon that condition, and thereafter the vessel was released and removed from the jurisdiction of the state. The statute makes no provision for such procedure, but the court, exercising equity jurisdiction, no doubt considered that such an order would protect the rights of all parties, so that no delay or damage would result, and for that reason substituted the bond for the vessel. In *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, the court said:

"There is no more valid objection to the attachment proceeding to enforce the lien in a suit *in personam*, by holding the vessel by mesne process to be subjected to execution on the personal judgment when recovered, than there is in subjecting her to seizure on the execution. Both are incidents of a common law remedy, which a court of common law is competent to give."

And in *Blossom v. Milwaukee etc. R. Co.*, 1 Wall. 655, Justice Miller said:

"It, however, seems to be well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its

orders; and that they may in like manner acquire rights in regard to the subject-matter of the litigation, which the court is bound to protect. Sureties signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment, become *quasi* parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognizances."

This action was pending, and the court had jurisdiction of the persons of the defendants and had possession of the vessel. The appellants voluntarily came into the action and agreed that, if the vessel were released to the defendants, the personal liability of the sureties is substituted for any lien or claim which the defendants may have against the vessel. This meant, of course, that the sureties assumed to pay whatever judgment should be rendered against the defendants. They became to that extent parties. It was not intended that the release of the vessel should oust the court of jurisdiction already acquired, nor that the judgment obtained should be an empty, unavailing thing, and that another action should be brought to recover upon the bond. But it meant that a judgment should be entered against the sureties the same as against the principals, and that execution should go against the property of the sureties as it might have gone against the vessel for which the sureties were substituted. The sureties were, therefore, by their voluntary appearance, to all intents parties, and were bound by the subsequent proceedings against the defendants and themselves as parties to the action. A personal judgment was therefore properly rendered against them, and violated no constitutional or other principle of law.

The judgment is therefore affirmed.

CROW, DUNBAR, and PARKER, JJ., concur.

RUDKIN, C. J. (dissenting)—It seems to me that this case is controlled by the principle announced in *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Noble v. Whitten*, 34

Wash. 507, 76 Pac. 95; and *Davis v. Virges*, 39 Wash. 256, 81 Pac. 688. See, also, 32 Cyc. 142. I therefore dissent.

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[No. 8243. *En Banc.* March 3, 1910.]

## RUFUS H. SMITH *et al.*, *Appellants*, v. SEATTLE CAMP NO. 69, WOODMEN OF THE WORLD, *Respondent*.[1]

LANDLORD AND TENANT—FORCIBLE ENTRY AND DETAINER—STATUTE—CONSTRUCTION. Provisions as to the time and manner of bringing the special proceeding of forcible entry and detainer against a tenant are to be strictly construed and the provisions of the general practice act for service by mail are not applicable (FULLERTON, J., dissenting).

SAME—NOTICE TO QUIT—SERVICE—WHEN COMPLETE—PREMATURE ACTION. Under Rem. & Bal. Code, § 812, making a tenant guilty of unlawful detainer if notice to quit or pay rent remains uncomplied with for the period of three days after service thereof, and § 814, providing for service of notice on a corporation, if no one is found on the premises, by posting a notice thereon and "sending a copy through the mail," addressed to the corporation, etc., service is not complete until the copy mailed is received by the corporation, as the statute contemplates three full days within which to comply with the notice; hence where a copy is mailed January 2, and not received until Monday, January 4, an action commenced January 6, is premature, and tender of rent on that day is in time (RUDKIN, C. J., GOSE, and MOUNT, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 26, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action of forcible entry and detainer. Affirmed.

*Weter & Roberts*, for appellants.

*McMartin & Dricken*, *T. P. Revelle*, *F. H. Holzheimer*, and *T. B. McMartin*, for respondent.

MORRIS, J.—Respondent was the lessee of a building in Seattle, used by it for camp purposes, of which appellants

[1]Reported in 107 Pac. 372.

were the owners. The rental was $200 monthly, in advance. On January 2, 1909, respondent being then in arrears for three months' rent, the appellants gave notice to pay the rent within three days or surrender possession of the premises. This notice was served by posting a copy upon the front door of the building, and, finding no person in charge of the premises, a copy was upon the same day mailed to respondent, addressed to it at the premises in question, which notice so addressed was received by respondent on Monday, January 4. On January 6, appellants commenced this action by service of summons and complaint, and upon the same day respondent tendered to appellants' authorized agent the $600 then due as rent. The same was refused, and subsequently was paid into court. Respondent then filed its answer, setting forth among other matters its tender of the rental due, on January 6 and before the commencement of the action by service upon it. The court below, upon the hearing of these issues, found that the action was prematurely brought, and entered judgment for respondent, and this appeal follows.

The only question presented by this appeal is, were the appellants justified in commencing the action on January 6. We think not. The forcible entry and detainer statute, being a special proceeding, is not governed by any of the provisions of the general practice act, and its provisions in regard to the time and manner of bringing actions thereunder must be strictly construed. *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454; 3 Wait, Law & Practice, 799.

The provisions of the general practice act in regard to service by mail, which are cited and discussed in the briefs, will not therefore be considered, as they can be of no value in determining the question before us. Recourse must alone be had to the act under which the action is brought. Its provisions are (Laws 1905, p. 173, ch. 86, § 1):

"A tenant of real property for a term less than life is guilty of unlawful detainer . . . 3. When he continues in possession in person or by subtenant after a default in

the payment of any rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner hereafter in this act provided) in behalf of the person entitled to the rent upon the person owning the same, shall have remained uncomplied with for the period of three days after service thereof. . . . " Rem. & Bal. Code, § 812.

"Sec. 2. . . . (3) . . . Service of any notice provided for in this act may be had upon a corporation by delivering a copy thereof to any officer, agent or person having charge of the business of such corporation, at the premises unlawfully held, and in case no such officer, agent or person can be found upon such premises, then service may be had by affixing a copy of such notice in a conspicuous place upon said premises and by sending a copy through the mail addressed to such corporation at the place where said premises are situated. . . . " Rem. & Bal. Code, § 814.

It will be observed that the service upon a corporation, when personal service cannot be had, consists of two acts; affixing a copy of the notice in a conspicuous place upon the premises, and sending a copy through the mail. Neither one of these alone is sufficient; both must concur. Referring again to the first quoted section, we find the provision that the tenant is not guilty of unlawful detainer until he continues in possession after notice served upon him shall remain uncomplied with for the period of three days. So that, whether the service be personal or in the substituted form permitted by the statute, three days must elapse thereafter before action may be commenced. The full three-day period is of the very essence of the statute, and without it there can be no subjection to its terms.

It will not do to say that the notice was posted three days, for such a posting cannot confer the right of action until it shall be supplemented by the concurrent act of mailing, and the lapse of three days after such service. Posting and mailing being two acts but one service, it is as essential that the three-day period shall follow the receipt by mail as that it shall follow the receipt by affixing to the door. Otherwise

there would be no effect given to the words "three days after service thereof," as applied to the notice. The object of these two provisions is to insure the receipt of the notice, and the statute has sought to safeguard it by requiring the two acts. If the tenant does not have his attention called to the posting on the door, he still has the assurance that it must be served upon him by mail, and that he will have three days thereafter in which to protect his possession. If the posting alone and the lapse of three days thereafter was deemed sufficient, there could be no necessity for the mailing; the fact that mailing is required is determinative of the requirement that it must give three days' notice, as does its concurrent posting. The purpose and intention of the affixing upon the door and of the sending by mail is to give notice, and there can be no giving of notice until notice is received. In the one case it is received upon the front door of the premises; in the other it is received through the agency of the mail. It appearing that the notice by mail was received January 4, and the action was commenced January 6, the tenant did not have three days in which to determine whether he would surrender or retain his possession, and until that time had elapsed his rights could not be terminated. As is said in *Alworth v. Gordon, supra,* the essential thing is that the tenant receive the notice in due time, and if the landlord selects the mail as the agency for delivering the notice, he takes the risk of its coming into the tenant's hands in due time.

We, therefore, hold the court below was correct in holding the action to be prematurely brought, and the judgment is sustained.

PARKER, CHADWICK, and CROW, JJ., concur.

FULLERTON, J. (concurring)—I concur in the result for the reason that I think the general statute relating to service by mail applies to this proceeding, and that the respondent had six days in which to comply with the notice to quit and was not in default when the action was begun.

RUDKIN, C. J. (dissenting)—In my opinion the service of the notice to quit was complete as soon as a copy was affixed to the premises and a second copy deposited in the post office properly addressed. I therefore dissent.

GOSE and MOUNT, JJ., concur with RUDKIN, C. J.

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[Nos. 8562, 8563. Department One. March 3, 1910.]

A. EISENBERG, *Appellant*, v. BEN C. NICHOLS, *Respondent*. KOSSUTH MARX JEWELRY COMPANY, LIMITED, *Appellant*, v. BEN C. NICHOLS, *Respondent*.[1]

EQUITY—MAXIMS—CONTRACTS—BREACH. The maxim that equity will not suffer a wrong without affording a remedy has no application in an action for damages for breach of a contract made by defendant's attorney without defendant's knowledge.

STIPULATIONS—ORAL—VALIDITY. An oral "street" agreement of an attorney to file a supersedeas bond on appeal in a cause, whereby the adverse party was led to delay the issuance of execution until the time therefor had expired, is void, under Rem. & Bal. Code, § 130, providing that the court shall disregard all agreements or stipulations in relation to the conduct of any of the proceedings of a cause unless the same be made in open court in the presence of the clerk, entered, etc., or signed by the party or his attorney.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered July 15, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for damages. Affirmed.

*Samuel R. Stern*, for appellant.

*R. E. Porterfield*, for respondent.

GOSE, J.—These cases involve the same questions and will be considered together. The controversy has twice been

[1]Reported in 107 Pac. 371.

before this court in varying forms; *Eisenberg v. Nichols*, 22 Wash. 70, 60 Pac. 124, 79 Am. St. 917; *Nichols v. Doak*, 48 Wash. 457, 93 Pac. 919, 125 Am. St. 942. The appellants obtained judgment against the respondent in separate actions, and sought to sell certain property upon execution. Thereupon the respondent instituted an action against each of the appellants and the sheriff, for the purpose of vacating the judgments and restraining the sales. The lower court having denied the relief sought and dismissed the action, the respondent appealed to this court, where the judgments were affirmed. *Nichols v. Doak, supra.* The appellants then instituted these actions, alleging that, when the appeal was taken in *Nichols v. Doak*, the respondent's then attorney agreed with the attorney for the appellants that he would give a supersedeas bond; that, relying thereon, the attorney for the appellants did not issue an execution until after the case was affirmed in this court, and that the execution was then issued and quashed on the motion of the respondent, on the ground that the judgment had expired by limitation. Judgments were entered in each case in favor of the defendant, and the plaintiffs have prosecuted separate appeals. The only evidence offered in support of the appellants' cause is a parol "street" stipulation between counsel that the appellant in the former appeal, the respondent here, would give a bond, and that the appellants' counsel relied upon the promise, and did not sell the property upon execution.

The appellants contend (1) that equity will not suffer a wrong without affording a remedy, and (2) that the attorney had the implied power to bind the respondent. The equity maxim has no application to the case. It is not claimed that the respondent himself ever knew that the promise was made. *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 18 Wash. 667, 52 Pac. 246; *Hill Estate Co. v. Whittlesey*, 21 Wash. 142, 57 Pac. 345, and *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795, are cited in support of the second conten-

tion. In the first of these cases a motion was made in this court to dismiss the appeal because the names of the appellants had been signed to the appeal bond by their attorneys. This court said the bond was sufficient "as the appellants would have been liable for the costs in any event." The other cases presented the same question, and the same ruling was made. We have no doubt that, where an attorney is directed to appeal, he has an implied authority to sign an appeal bond in the name of his principal. Whether he has the power to execute a supersedeas bond in his principal's name presents a very different question, and one which we do not find it necessary to decide for reasons which will later appear. Rem. & Bal. Code, § 130, subd. 1, provides:

"An attorney and counselor has authority—

"1. To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of or any of the proceedings in an action or special proceeding, unless such agreement or stipulation be made in open court, or in the presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney."

We think this statute is controlling in this case. There is no claim that it was complied with in any respect. In *Borkheim v. North Bank & M. Ins. Co.*, 38 Cal. 623, the plaintiff commenced separate actions against several insurance companies to recover loss caused by the same fire, the counsel and the issues in each action being the same. While one of the cases was on trial, it was verbally agreed in open court between counsel that the other cases should abide the result of the one on trial, but the agreement was not filed with the clerk nor entered in the minutes until some three weeks later, when it was so entered upon the motion of the counsel for the defendant, the plaintiff's counsel appearing but not consenting. The plaintiff having been defeated in the action tried, a judgment was entered against him in the other cases.

Thereupon the plaintiff appeared by other counsel and moved to set aside the judgment, which motion the lower court denied. The California statute provided:

"An attorney and counselor shall have authority: First, to bind his client in any of the steps of an action or proceeding, by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise."

Upon appeal the court in reversing the judgment held, that "it would be no misnomer to call the statute a statute of frauds," and that to allow such stipulations to be enforced against the will or without the consent of both parties would work the precise mischief which the statute was designed to prevent.

In *Merritt v. Wilcox*, 52 Cal. 238, the trial court set aside the judgment as originally entered, and substituted therefor a judgment payable in United States gold coin, holding the defendant bound to that effect by the parol agreement of his attorney. Upon appeal the court said it was not necessary to hold that every waiver or consent of counsel made in the presence of the court at the trial of the cause, such as the order of presenting the evidence, the best evidence, and other similar details of the trial, should be reduced to writing as provided by statute, but that "the statute has defined, with remarkable precision, and by the use of both affirmative and negative words, the precise limit of the authority of an attorney to bind his client by his agreement, and it has declared the filing of the agreement with the clerk, or its entry on the minutes of the court, indispensable to its validity."

In *State v. Stewart*, 74 Iowa 336, 37 N. W. 400, in a suit upon an appearance bond, the defendant sought to show an agreement between his attorney and the state's attorney, to the effect that the judgment would not be enforced until a later date which had not arrived when the action was commenced, and that the defendant was therefore not in default. The court held that the evidence was immaterial under the statute which provided that no evidence of an agreement of

an attorney to bind his client is receivable "except the statement of the attorney himself, his written agreement, signed and filed with the clerk, or an entry thereof upon the records of the court." See, also, 3 Am. & Eng. Ency. Law (2d ed.), 355.

Our statute has not only clearly defined the manner in which an attorney may bind his client, but has provided with equal precision that the court shall disregard all agreements and stipulations which do not conform thereto. The stipulation not having been made as the statute directs, it placed no obligation on the respondent. Having reached the conclusion that no legal stipulation was made, it is not necessary to consider the question of the power of the attorney to bind his client by engaging to give a supersedeas bond.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ., concur.

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[No. 7483. *En Banc.* March 3, 1910.]

EDNA MURRILLA, *Respondent*, v. SAMUEL GUIS, *Appellant*.[1]

TORTS—EVIDENCE—SUFFICIENCY—SEDUCTION—PLEADING—VARIANCE. Under a complaint making a general charge of seduction, the evidence shows an actionable wrong, even if not a technical seduction, and there is no fatal variance between the pleading and the proof, in the absence of a motion to make the complaint more specific, where the plaintiff's evidence showed a case of rape in the first instance, the relations were continued under a promise of protection by reason of her frame of mind produced by the first ravishment until pregnancy arose, which was avoided by abortive means provided by the defendant.

SEDUCTION—DEFENSE—PREVIOUS CHARACTER. Previous chaste character is not a condition precedent to a civil suit for seduction.

WITNESSES—IMPEACHMENT—INSTRUCTIONS. Under an instruction to the jury that if a witness testified falsely in one thing they should reject her testimony as to all matters wherein she is not cor-

[1]Reported in 107 Pac. 378.

roborated, false testimony is not shown by an apparent contradiction between her answers to interrogatories and her testimony, where the question of contradiction depended upon the construction to be placed upon certain words, and the answers to the interrogatories were made on the advice of an attorney in the belief that they were truthful.

SEDUCTION—EVIDENCE—CORROBORATION—NECESSITY. Corroboration of the plaintiff's testimony is not necessary in a civil action for seduction.

SAME—CORROBORATION. There is corroboration of plaintiff's testimony that she was seduced by the defendant, the proprietor of a dance house in which she worked, where it was shown that he paid unusual attention to her and had opportunities, that he purchased drinks for her at different times, was with her in a bed room and had drinks with her there, and that she made complaints at about the time, and there was trouble between them.

CHADWICK, MOUNT, and CROW, JJ., dissent.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 16, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for damages for seduction. Affirmed.

*G. C. Israel*, for appellant.

*Parker & Brown*, for respondent.

ON REHEARING.

FULLERTON, J.—This case was heard originally at the October session of the court in 1908, and an opinion written affirming the judgment of the court below. The opinion will be found in 51 Wash. 93, 98 Pac. 100. Subsequently a rehearing was granted, and the cause reargued at the May term of 1909. At the rehearing counsel for appellant presented with great force and ability his objections to the judgment urged at the former hearing, particularly the objections that the verdict is against law, and that the evidence is insufficient to justify the verdict.

But first we will notice the contention that the evidence failed to establish the allegations of the complaint, in that

it failed to show that the respondent was seduced; the precise objection being that the evidence tended to prove rape, if it tended to prove anything, and not seduction. Answering this objection at the former hearing, the chief justice, who pronounced the opinion of the court, used this language:

"Undoubtedly the testimony of respondent tended to show a case of rape in the first instance. She testified that appellant called at her room and brought wine with him, insisting that she should drink with him, which she did; that soon after drinking she lost consciousness and, upon recovering consciousness, she was lying upon her bed and appellant was sitting beside her; whereupon she discovered that she had been ravished. The above, it is true, tended to establish rape only; but she proceeded to testify that, a day or two following the occasion specified, appellant again called and insisted that she should yield to him, which she consented to do because of his promise to protect her and also because of the feeling that she was already ruined and she did not care what became of her. She says that their relations were afterwards repeatedly continued under those circumstances for several months, during which time a condition of pregnancy arose which was afterwards avoided by abortive means provided by appellant. We think the above showed a *prima facie* case of seduction. The artifices used by appellant, taken all together, had the effect to overcome her scruples at a time when she was capable of consenting, and did consent, and not the least of those artifices was the method used the first time which left her in a frame of mind to be afterwards easily influenced to yield to his demands."

It seems to us now that this sufficiently answers the objection. Manifestly there was here shown an actionable wrong. The seduction shown did not consist solely of the ravishment. This was only one of the several means used to accomplish the seduction. Nor do the proofs depart so far from the allegations of the complaint as to constitute a variance. The charge in the complaint was general. The means used to accomplish the seduction were not set out with particularity. Doubtless the appellant could, by a proper motion at the proper time, have had them made specific, but since

he did not do so the respondent was entitled, under the pleadings as they stood, to show the acts constituting the seduction.

Again, it is insisted that the respondent was not of that chaste character that would permit of her seduction. It is urged that her profession and conduct was such that it is too much to suppose that she could have maintained her virtue in the presence of her admitted environment; also that she was of such unchaste character, because of her conduct and speech, that she was incapable of being seduced, even though prior to the time she had sexual intercourse with the appellant she had not had sexual intercourse with other men. But the first contention we think was for the jury. It is possible, though perhaps it be not overprobable, that a woman may take part in dance hall performances even in Alaska and not be a prostitute. Whether this was the exceptional case was a fact that the jury had the privilege of determining from the evidence, and the court ought not to be hasty in setting up its judgment against theirs. From the second proposition we differ *in toto*. We do not believe that man has an unbridled license to drug and carnally know and thereafter by promises of protection induce a woman to have further carnal knowledge with him merely because she may be unchaste in speech, indiscreet in conduct, and an actress performing in a dance hall. The cases cited by counsel as sustaining this contention go to the full length under the facts they present; but, with one exception, they are criminal cases where previous chaste character is a condition precedent to a conviction. For the civil action of seduction, under our statute, previous chaste character is not made a prerequisite. Any woman may maintain an action for her own seduction whether or not she be of previously chaste character. The civil case cited, *Breon v. Henkle*, 14 Ore. 494, 13 Pac. 289, is so wide in its facts from the case at bar as not to be in point. We feel, therefore, that our former conclusion on this branch of the case is just.

The contention that the verdict of the jury is against law is founded on the claim that the jury disobeyed the instructions of the court. The court charged the jury that if they found that any witness testified falsely to any material matter then they should reject the testimony of such witness as to all matters and things wherein it is not corroborated by other witnesses; and, further, that the jury must be able to find that the evidence the respondent gave as to her seduction by the appellant was corroborated by some other evidence in the case before they could find in her favor; that they could not find seduction on the evidence of the respondent alone. It is argued that these instructions, whether right or wrong, became the law of the case, and that the respondent did in fact testify falsely, and there was in fact no corroboration of her testimony on the question of her seduction.

In support of the first proposition, the appellant calls attention to answers the respondent made to certain written interrogatories propounded to her prior to the trial of the cause, and her answers made to questions asked her while being cross-examined at the trial. But a careful comparison of her testimony convinces us that there was no such contradiction shown as to require us to find, as a matter of law, that the witness testified wilfully false at any stage of the proceeding. As her counsel well argues, whether or not there is a contradiction depends in a large measure upon the interpretation that is put upon the words used by counsel in framing the interrogatories. For example, he asks her if she did not "entertain" certain gentlemen in her sleeping apartments on certain occasions; if she did not do what was called "rustling for drinks" in certain dance halls; if she did not sell drinks in boxes in certain others; to each of which she answered, No. In her cross-examination at the trial she testified that at one place men came to her sleeping rooms and drank wine and beer there with her; that men would buy drinks for her at the dance halls mentioned, and

that the waiters sold drinks to persons in boxes with her, although she sold none herself.

It is plain that if by "entertain" it were meant the act of drinking wine and beer with men in her rooms, then she contradicted herself, while if it be meant by that word that she sustained criminal relations with men at that time and place, she did not do so. So with the phrase "rustling for drinks," if her acts of drinking with men in dance halls be "rustling for drinks," she testified falsely, while if it be meant that she by immoral acts induced men to buy drinks, she did not so testify. So, also, with the phrase "selling drinks," if it be meant thereby that she asked and persuaded men while in boxes to buy drinks, then she testified falsely, while if it be meant that she actually sold drinks herself, she did not so testify. Moreover, it was stated by her counsel that the answers to the interrogatories were given under his advice, after the respondent had stated to him fully and fairly all of her acts at the places to which the inquiries related, and that her answers were made on his advice in the belief that they answered the interrogatories truthfully. In view of these circumstances, it would be going too far, we think, to say that she had legally forfeited her right to recover for the wrongs suffered by her at the appellant's hands. As we said in our former opinion, it may be that the circumstances were such as to challenge the attention of the jury to a careful scrutiny of her testimony, but we conclude now, as we concluded then, there is no room to contend that the testimony presents a question to be determined as a question of law.

The second branch of this contention, namely, that there was no corroborating evidence as to the respondent's seduction by the appellant, seems to us also to be untenable. As a matter of law the respondent's evidence needed no corroboration in order to legally sustain a verdict in her favor. This is a civil action, and the respondent had the same right to have her naked testimony weighed by the jury as the

appellant had to have his testimony so weighed. But the court charged the jury that the respondent's evidence must be corroborated, and the appellant insists that this charge became the law of the case, and that unless this court can find sufficient corroborative evidence it must reverse the case and send it back for a new trial. But this burden is not upon us. The trial judge, at the time he instructed the jury to this effect, also instructed them that it was for them to say whether the respondent was corroborated by other evidence in the case, and thus committed himself to the doctrine that there was evidence corroborating the statements of the respondent. The question comes to us, therefore, like all other disputed questions of fact. We have not to inquire as to the weight and sufficiency of the corroborative evidence, but merely was there such evidence. We think there was corroborative evidence. It was admitted by the appellant that he was one of the proprietors of the house at which the respondent worked; he admits that he purchased drinks for her at different times; it was shown that he at one time took her to the cottage of another inmate of his house, and was with her in the bedroom while callers occupied the front part of the house, and that there he had drinks with her; it was shown that the respondent made complaint to a friend of his treatment of her about the time she now alleges the act of seduction occurred, in which she cried over her trouble and bemoaned the fact that she could never marry; and a witness for the appellant testified that he was told at Juneau of trouble between the respondent and the appellant. While other circumstances might be pointed out, this evidence, it seems to us, sufficiently sustains the judgment on the point in question.

From the nature of the offense, the victim of the seduction and the appellant are, of course, the only persons who can testify to the actual occurrences. The occurrences were had in secret, and if it be the rule that a woman wronged under these conditions must produce an eyewitness to the overt

act, then truly no recovery can ever be had for crimes of this character. Opportunity to commit the act, undue and unusual attention on the part of the seducer to the seduced, remorse on the part of the victim, and concurrent complaints of the wrong may not be strong corroborative circumstances, but they tend in that direction. It must be remembered that the appellant is not being prosecuted for crime. It is not a question of his guilt beyond a reasonable doubt. The case is merely a civil action at law to be determined by the preponderance of the evidence. It is one, moreover, in which the appellant has the right to have the evidence weighed by a jury and not by the court, and when the verdict is sustained by substantial evidence, this court but usurps its functions and deprives a litigant of a fundamental right when it assumes to override the jury's verdict. Other questions suggested are sufficiently discussed in our original opinion. The judgment is affirmed.

PARKER and DUNBAR, JJ., concur.

RUDKIN, C. J. (concurring) — Whether the testimony shows a technical seduction may well be doubted, but it tends to show an actionable wrong sufficiently covered by the allegations of the complaint, and I therefore concur in the judgment.

MORRIS and GOSE, JJ., concur for the reason stated by RUDKIN, C. J.

CHADWICK, J. (dissenting)—I dissent. Appellant was the proprietor of a dance hall and house of prostitution and should be punished for his misdeeds, but his fine should go to the state and not to one of his employees. A careful reading of the testimony has convinced me that respondent was not seduced or raped or assaulted in mind or body, but that she maintained illicit relations with appellant and with others, of her own free choice. She had been a voluntary inmate of similar dives in Portland, Oregon, and in Seattle. Her associates and companions were, and had been, disreputable and

outcast women. The verdict, if sustained, must rest, as the majority opinion impliedly admits, upon respondent's own naked testimony. Her showing is that she was raped, not seduced, and if there were aught to commend her utterance the verdict should not be questioned. But the rule is old and will not be denied, that a woman of evil repute is of questionable credibility. "She could not have ruthlessly destroyed that quality upon which most other good qualities are dependent, and for which, above all others, a woman is reverenced and respected, and yet retain her credit for truthfulness unsmirched." *State v. Coella*, 3 Wash. 99, 28 Pac. 28. Aside from respondent's occupation, she was, in my judgment, thoroughly impeached on the trial. Her protestations of innocence and outrage, although overcome by every circumstance, every probability, and every presumption attending the trial, have been measured by the standards of chastity, moralty, and virtue. The case should not have been submitted to the jury.

MOUNT and CROW, JJ., concur with CHADWICK, J.

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[No. 7502. *En Banc.* March 3, 1910.]

NATIONAL MILLING & MINING COMPANY, *Respondent*, v. JAMES PICCOLO, *Appellant*.[1]

MINES AND MINERALS—CLAIMS—RELOCATION—REQUISITES. Relocators of abandoned mining claims west of the summit of the Cascade mountains need not sink a discovery shaft, under Rem. & Bal. Code, § 7366, providing that the provisions of the act relating to discovery shafts shall not apply to any mining location west of the summit of the Cascade mountains; since said exception is not confined to §§ 7358 and 7359, prescribing the duties of the discoverers of an original claim and providing that he shall sink a discovery shaft, but applies also to § 7355 of the act which provides that the relocation of forfeited or abandoned quartz or lode claims shall only be made by sinking a new discovery shaft and fixing new boundaries

[1]Reported in 107 Pac. 353.

as required in making a new location, or the relocator may sink the original discovery shaft ten feet deeper than it was (overruling *Id.*, 54 Wash. 617).

CHADWICK, FULLERTON, MOUNT, and GOSE, JJ., dissent.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered November 19, 1907, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover the possession of mining claims. Reversed.

*Kirkpatrick & Doty* and *Morris, Southard & Shipley*, for appellant.

*J. H. Naylor* and *Merrick & Mills*, for respondent.

ON REHEARING.

DUNBAR, J.—This case was heard in Department One, and a decision rendered and filed September 25, 1909, reported in 54 Wash. 617, 104 Pac. 128, where a detailed statement of the case is given which we will not repeat here. Upon petition a rehearing was granted, to be heard *en banc*. On the rehearing somewhat extensive briefs were presented by counsel on both sides, the appellant contenting itself with arguing only the question of the construction of the statute under which it was determined that the appellant had not complied with the provisions of the law in relation to the sinking of shafts, etc. The respondent, in its brief, asks the court not only to affirm its previous decision in that regard, but also to enter again upon an original investigation of the statement of facts and upon an investigation of all the questions presented at the original hearing.

In consideration of the view we have taken upon the statutory question, and considering the fact that the appellant in this case seems to have no actual equities but is standing strictly upon his legal rights, we have again examined the voluminous record in this case. But after such an examination we are convinced that there is no escape from the conclusion reached by the court in the original opinion, that

the findings of fact did not justify the conclusions of law reached by the lower court or, to quote approvingly the words of the writer of the opinion:

"The court's findings show in detail what was done by the respondent towards doing the assessment work for the year 1905. These findings, in our opinion, do not justify the conclusion that the respondent did work enough to save the claims from forfeiture, had a valid location of the ground intervened between January 1, 1906, and the time the appellant ousted the respondent therefrom."

But, said the court,

"The findings make it clear that no valid location intervened. While the notices were properly posted and the claim properly marked on the ground by the appellant, there is no finding or evidence that the notice complied with the statute, or that the location was completed by sinking a discovery shaft on the lode of the claim;"

the court holding that the section of the law wherein it is announced that the provision relating to discovery shafts shall not apply to any mining location west of the summit of the Cascade mountains did not excuse the sinking of the shaft in this case, on the theory, it seems, that the proviso applies only to original locations where there is a discovery, but not where there was an attempt to take advantage of a forfeiture; that in the latter case the shaft must be sunk to complete the location.

Upon further and mature consideration, we are unable to place this construction upon the statute. We will not enter into a discussion of the many cases cited by the appellant or a discussion of the Federal laws governing mining claims and operations, for it may be conceded that, under the Federal authorities, the location of the appellant was sufficient, and it is conceded that Federal authorities are not exclusive, and that power is left in the state to make laws and regulations governing the location of mining claims. So that it is sufficient in this case to place a construction upon our own statute in that regard. Chapter 45 of the Laws of 1899,

page 69 (Rem. & Bal. Code, § 7358 *et seq.*), entitled: "An act providing for the manner of locating and holding lode and placer mining claims, prescribing authority of mining districts," prescribes in section 1 the duties of the discoverer of the lode. Section 2 provides that:

"Before filing such notice for record, the discoverer shall locate his claim by first sinking a discovery shaft upon the lode, to the depth of ten (10) feet from the lowest part of the rim of such shaft at the surface, and shall post," etc. Rem. & Bal. Code, § 7359.

Section 8 provides as follows:

"The relocation of forfeited or abandoned quartz or lode claims shall only be made by sinking a new discovery shaft and fixing new boundaries in the same manner and to the same extent as is required in making a new location, or the relocator may sink the original discovery shaft ten feet deeper than it was at the date of commencement of such relocation," etc. Rem. & Bal. Code, § 7365.

Section 9:

"The provision herein, relating to discovery shafts, shall not apply to any mining location west of the summit of the Cascade mountains." Rem. & Bal. Code, § 7366.

Can the proviso of § 9 be limited to the provisions of §§ 1 and 2 without applying to the provisions of § 8? It is contended that the word "only," in the second line of § 8, where it is said that the relocation of forfeited or abandoned quartz or lode claims shall "only" be made by sinking a new discovery shaft, lends color to the contention, and if this were the only qualification for obtaining title by relocation of forfeited or abandoned claims, the contention might possibly be sustained. But considering the whole section together, in our judgment it simply means that the relocation of forfeited or abandoned quartz or lode claims shall only be made in the same manner as is provided for in the former section; for the direction continues, "and fixing new boundaries in the same manner and to the same extent as is required in making a new location," etc. Then follows the

statement that the provision relating to discovery shafts shall not apply to any mining location west of the summit of the Cascade mountains. The language is clear and comprehensive applying to any mining location, and a mining location of a forfeited or abandoned quartz claim is as much a location as an original discoverer's location. To hold that § 9 applied in one instance and not in the other would be to eliminate from the law its most comprehensive provisions.

Abiding, then, by the announcement originally made, that the findings of the court do not justify the conclusion that the respondent did work enough to save the claims from forfeiture had a valid location of the ground intervened between January 1, 1906, and the time the appellant ousted the respondent therefrom, and construing the statute as releasing the appellant from the duty of the provisions in relation to discovery shafts, we are compelled to hold that the judgment of the lower court should be reversed, and it is so ordered.

RUDKIN, C. J., CROW, MORRIS, and PARKER, JJ., concur.

CHADWICK, J. (dissenting)—To dissent from the majority opinion may be redundant in the light of what was said by Judge Fullerton when the case was first decided, 54 Wash. 617, 104 Pac. 128. It does seem to me that the majority in its endeavor to follow the letter of the law have utterly ignored its pretense and spirit. It is not explained why, if the construction put upon § 8 is proper, it was ever enacted at all. A very certain test of a statute, when of doubtful meaning, is to refer to the reasons prompting its enactment. It will require no argument to convince the reader that § 8 is useless cargo, serving no possible purpose, unless it was written to serve the purpose set out and explained in Judge Fullerton's opinion. The majority opinion reads the word "only" out of § 8, saying:

"It is contended that the word 'only,' in the second line of § 8, where it is said that the relocation of forfeited or abandoned quartz or lode claims shall 'only' be made by sinking a new discovery shaft, lends color to the contention, and if

this were the only qualification for obtaining title by relocation of forfeited or abandoned claims, the contention might possibly be sustained. But considering the whole section together, in our judgment it simply means that the relocation of forfeited or abandoned quartz or lode claims shall only be made in the same manner as is provided for in the former section."

Right here the opinion is at fault. The whole section is *not* considered together; else why is no mention made, or construction attempted, of the last clause of the section, which reads as follows:

". . . in either case a new location monument shall be erected and the location certificate shall state if the whole or any part of the new location is located as abandoned property?"

The statute undertook to put upon the one who claims mining ground as abandoned or forfeited a burden that was not imposed upon an original locator; and properly so, for the one who takes abandoned ground takes more than the mere land. He reaps the reward of another's foresight and industry. Section 8 declares that he shall do more than file upon the land. It requires some evidence of good faith. It puts the burden of proving the abandonment or forfeiture on the relocator, whereas, under the opinion of the majority, the burden of proof would be upon the one who is put to the necessity of ejecting the intruder. To save § 9, which is written in the singular and evidently refers to § 2 of the act, the majority has held § 8 for naught, notwithstanding it most clearly appears to be an exception to the statute and in no wise conflicts with its general provisions. Although the words "discovery shaft" are used in § 8, they should not be held to refer to an original discovery such as is provided for in § 2, and as referred to in § 9. The word "discovery" is superfluous. This is made manifest by the words, "or the relocator may sink the original discovery shaft ten feet deeper than it was at the date of commencement of such re-

location," etc., the law being that he is not bound to make a new discovery, but is bound to sink ten feet in the ledge. There is and can be no such thing as a "discovery" where the shafts, tunnels, bunkhouses, and bins of another are appropriated; but there can be, and it was the intent of the law of 1899 to compel, some expenditure of time and money on the part of the one who jumps the claim of another. The object of the law of 1899 was to make claim jumping hard. The decision of the majority not only makes it easy, but will incite the mining claim jumper and blackmailer to new activities.

FULLERTON, MOUNT, and GOSE, JJ., concur with CHADWICK, J.

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[No. 8342. Department Two. March 4, 1910.]

WENZEL STRUNTZ *et al.*, *Appellants*, v. FRANK HOOD *et al.*, *Respondents*.[1]

JUDGMENT—BAR—MATTERS CONCLUDED—BOUNDARIES—ELECTION OF REMEDIES. A judgment establishing a disputed boundary line is a bar to a subsequent action of ejectment brought by the same plaintiff against the defendants to recover a strip along the boundary line by right of adverse possession, since the plaintiff elected his remedy in the former action and alleged ownership of the respective parties up to the line, a government subdivision.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 13, 1909, in favor of the defendants, upon granting a nonsuit in an action of ejectment. Reversed.

*Belt & Powell*, for appellants.

*Munter & Lovejoy*, for respondents.

DUNBAR, J.—In 1903 the appellants were the owners of lots 5 and 6, and the north half of the southwest quarter of

[1]Reported in 107 Pac. 352.

section 2, in township 26, north, range 45, east; and the respondents were the owners of lots 1, 4, 5, and 6, of section 3, being the only portion of said section which could be affected by the boundary line. The boundary line was in dispute between these parties, the appellants claiming a portion of the land which was claimed by the respondents. After considerable contention about their respective possessions, the appellants, Struntz and wife, began a suit to have the line between sections 2 and 3 found and located. A commission was appointed to locate the line and it was located practically where it was claimed to be by the respondents. An appeal was taken from that case to this court and the judgment of the court was affirmed. This appeal is found in *Strunz v. Hood*, 44 Wash. 99, 87 Pac. 45, where a more circumstantial statement of the case is made.

Afterwards this action in ejectment was brought by appellants, Struntz and wife, alleging title to the land in dispute by adverse possession. The former action was pleaded in bar and set forth *in extenso*, and the allegations of adverse possession were denied. A demurrer was interposed and was sustained as to the first defense, viz., the plea in bar, and overruled as to the other defenses. The sustaining of this demurrer to the first defense was excepted to by the respondents. The case proceeded to trial and judgment of nonsuit was granted to the respondents, for the reason that the evidence was not sufficient to sustain the allegation of adverse possession. From this judgment this appeal is taken.

After an investigation of the pleadings and testimony, we are of the opinion that the court erred in both the essential rulings made. Without reciting specially the testimony in the case, we are satisfied that, if the case were to rest upon its merits, there was sufficient testimony on the part of the appellants tending to show adverse possession to sustain that claim.

We are also of the opinion that the plea in bar ought to

have been sustained. This, it seems to us, is a simple proposition. The appellants, plaintiffs in the first case, had the right to select their remedy. They could have brought their action in ejectment as they have now, or they could proceed in the way they did by bringing their action to establish or determine the boundary line, and they elected the latter method. It is evident, however, that the object sought to be obtained was the same in both actions, for in the former suit they alleged that they were the owners to the boundary line on one side and the defendants were owners to the boundary line on the other side, the boundary line being between an even or government section in which was embraced the land of the appellants, and an odd or railroad section in which was embraced the land of defendants, and asked that the boundary line be determined. There could have been no other deduction from the complaint than that the determination of the line determined the respective titles of the parties to the action, and having in that case alleged ownership in the defendants up to the line, they ought now to be estopped from denying the material allegation in the complaint which they then made, and which was tried out in that action and determined against them. Such a practice not only leads to a multiplicity of suits, which is frowned upon by the law, but it would in effect be actually trying the same vital issues in two different actions, notwithstanding one may be termed an equitable and the other a civil action.

We have not overlooked the case of *King v. Brigham*, 23 Ore. 262, 31 Pac. 601, 18 L. R. A. 361, cited by appellants; but we think that this case was decided under a misapprehension of what were the fundamental principles announced in *Love v. Morrill*, 19 Ore. 545, 24 Pac. 916, upon which it seems to have been based. In the latter case, as we view it, the court was only attempting to announce the doctrine that a litigant cannot be deprived of his right to a jury trial of legal questions by bringing an action against him in equitable form; that courts of equity have no jurisdiction to try

purely legal titles disentangled from any equitable features; and where it appears, as it did in that case, which was a case of disputed boundary line, that the only controversy between the parties was the legal title to a strip of land claimed to have been acquired by adverse possession, the complaint will be dismissed and the parties relegated to a legal action. This case unquestionably reflects the general rule, so far as the right of trial by jury is concerned, but in this jurisdiction we have arrived at the same result by a more direct and less expensive route; viz., by conceding the right to trial by jury when a case involves questions of fact, instead of subjecting the litigants to loss of time and the expense of dismissing one action and bringing another in the same form involving the same facts and before the same tribunal.

The cause will be reversed, with instructions to overrule the demurrer to the first defense pleaded in the answer.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

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[No. 8448. Department One. March 4, 1910.]

HERVEY LINDLEY, *Respondent*, v. J. R. McGLAUFLIN, *Appellant*.[1]

ACCOUNT—ACTION—COMPULSORY REFERENCE — EQUITY — RIGHT TO JURY TRIAL. The rights of the parties cannot be determined except by taking an accounting, and a compulsory reference may be ordered, under Rem. & Bal. Code, § 370, and a jury trial denied, where the first cause of action alleged that defendant had been left in charge of plaintiff's business, a manufacturing plant, upon a salary, with the duty of a manager, including the keeping of accounts, for about one year, that defendant had disobeyed instructions, constructed himself a house from plaintiff's materials, misappropriated money, and overdrawn his account, for which he had made no accounting, setting forth the items in detail, aggregating $1,291.30; and the answer claimed a larger salary based upon the profits of the business alleged at $7,344, claiming a balance due him of over $1,600; and the reply denied that there were any profits in the business.

[1]Reported in 107 Pac. 355.

ACCOUNT—GROUNDS FOR—FIDUCIARY RELATIONS. In an action involving a long and complicated account, a compulsory reference may be ordered regardless of whether any partnership or other fiduciary relation existed between the parties.

ACCOUNT—PLEADINGS—ACTIONS—LEGAL OR EQUITABLE—DETERMINATION. Whether an action presents a legal or equitable cause of action, involving a long and complicated account, may be determined from all the pleadings, and does not depend upon the complaint alone.

ACTIONS—JOINDER—LEGAL AND EQUITABLE—MULTIPLICITY OF SUITS—ACCOUNT. In an action against plaintiff's manager, involving an accounting of the business for about one year, for money and property misappropriated, other legal causes of action for the conversion of certain property, and for negligence in conducting the business, are so connected with or growing out of the principal transaction as to be triable with it in equity, to avoid a multiplicity of suits.

Appeal from a judgment of the superior court for King county, Main, J., entered June 23, 1909, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action on money demands involving an accounting. Affirmed.

*Roberts, Battle, Hulbert & Tennant*, for appellant.

*J. T. Watson* and *Dorr & Hadley*, for respondent.

FULLERTON, J.—This is an appeal from a judgment entered in an action tried by the court without the intervention of a jury. The defendant contended that the action was an action at law, and demanded a trial by jury, paying into court a jury fee. The court, however, ruled that the action was one of equitable cognizance, properly triable as such, and proceeded accordingly. The correctness of this holding is the sole question presented by the appeal.

The complaint of the plaintiff contained three separate causes of action. In the first it was alleged, in brief, that the plaintiff was the lessee of a certain manufacturing plant, consisting of a planing and shingle mill, an office building, and certain other buildings, together with the land on which the plant and buildings were situated; that he entered into

an oral agreement with the defendant by which the defendant agreed to manage the plant and business of the plaintiff for a consideration and salary of $100 per month; that the defendant entered upon his duties as such and continued therein for the period of about one year, during which time he had the sole custody and charge of the business, including the keeping of the accounts of the business; that the plaintiff desired to make a trip abroad, and just prior to leaving gave the defendant positive instructions concerning the conduct of the business; that he did make such a trip, being abroad some five months; that on returning he found that the defendant had disobeyed his instructions, in that he had purchased large and excessive amounts of material, had used the plaintiff's materials to construct a house for himself and wife, had borrowed on plaintiff's account large sums of money in excess of the amounts he was authorized to borrow, had largely overdrawn his account and had credited himself with money to which he was not entitled to credit himself with, and had appropriated to his own use moneys derived from the business and belonging to the plaintiff for which he had made no accounting at all. The items charged as having been misappropriated were set forth in detail, and made a total of $1,291.80.

For a second cause of action the plaintiff alleged that the defendant, without the knowledge or consent of the lessors or the plaintiff, moved a building from the leased ground to ground not included in the lease and not owned by the lessors, and that the plaintiff was obligated to return the building to its proper place, to his damage in the sum of $200.

For a third cause of action the plaintiff alleged that, during his absence, the defendant, through gross carelessness and negligence, had left the safe in the office building unlocked, and that some person or persons unknown to the plaintiff has entered therein and had stolen and carried away moneys of the plaintiff aggregating $88.75. The prayer of

the complaint was for the recovery of these several sums with interest.

The defendant, answering the complaint, admitted the fact that he was employed as manager of the plaintiff's business, but denied practically all of the other allegations of the complaint. For a first separate answer, he alleged that he was employed at a salary of $150 per month, instead of one hundred dollars per month, as alleged by the plaintiff, and in addition thereto was to receive twenty per cent of all profits made in the business; that the business made a profit during the twelve months in which he acted as manager of $7,344; and that in salary and profits he was entitled to take from the business $3,268.80, that he had taken but $1,650, leaving a balance due him of $1,618.80.

For a second separate answer, he alleged that he owned, in his own separate right, certain personal property, of the value of $720, which was left on the plaintiff's premises at the time he was discharged, and that the plaintiff had appropriated and converted the property to his own use. He thereupon demanded judgment against the plaintiff for the sum of $2,338.80 with interest.

A reply was filed, in which it was alleged that the defendant was to receive a salary in excess of $100 per month only in case there was a profit in the business; in which case he was to receive an additional sum of $50 per month, or such portion of such additional sum as twenty per cent of the profit would pay; and that there were no profits in the business during the time the defendant acted as manager, but on the contrary there was an actual loss.

This being the status of the issues, it has seemed to us that there could be but little question as to the correctness of the court's ruling. Manifestly the right of the parties could not be determined except by taking an accounting between them, and as the transactions appeared by the pleadings to be extensive and varied, it necessarily involved a long and complicated accounting. It has long been the rule that these con-

ditions alone justified the assumption of jurisdiction by a court of equity. Indeed, in this state it is especially provided by statute (Rem. & Bal. Code, § 870) that a compulsory order of reference may be made when the trial of an issue of fact shall require the examination of a long account on either side; this, on the principle, of course, that the proceeding was formerly cognizable in chancery and not subject to trial as an action at law; and, of course, if the court may make a compulsory order of reference in such a case, it may make the accounting itself without the aid of a jury. Jurisdiction of equity in this class of cases had its rise in the inadequacy of the common law remedy. A court of law sitting with a jury is not a tribunal constituted so as to try an action involving a long account and reach an accurate result. The jury have no adequate facilities for keeping records of the several items going to make up the account, and the ordinary mind cannot keep them in memory. The result must necessarily be a verdict without adequate consideration of the matters involved, resulting oftner than otherwise in rank injustice to one party or the other.

The appellant has devoted a large space in his brief to the discussion of the question whether he and the respondent were in fact partners, apparently on the theory that this relation must be found to exist before a court of equity can exercise jurisdiction of an accounting between them, but such is not the rule. Courts of equity sometimes assume jurisdiction over an accounting between parties when a fiduciary relation exists between them when otherwise it would not, but it is nowhere held that a partnership relation must exist in order to give such jurisdiction. Where fiduciary relations exist between the parties, whether of partnership or some other manner, courts of equity have always asserted jurisdiction over an accounting between them (1 Enc. L. & P. 740); and here clearly there was such a fiduciary relation. But as we have before indicated, we do not think even a fiduciary relation necessary in all cases to give a court of equity jurisdiction.

If the action involves a long and complicated account, as it did in this instance, the court has jurisdiction to try it in that manner which will do justice between the parties, regardless of the character of the legal relationship between them.

The appellant insists, further, that the question whether the action is of legal or equitable cognizance must be determined from the complaint alone, not from the pleadings in their entirety, and urges that the complaint in the present case shows a legal and not an equitable cause of action. But a defendant under the code may set forth by answer as many defenses as he may have, "whether they be such as have heretofore been denominated legal or equitable, or both." In other words, a purely equitable defense may be set forth to a purely legal action; and, since it may be set forth, it may be tried as an equitable action. *Peterson v. Philadelphia Mtg. & Trust Co.*, 33 Wash. 464, 74 Pac. 585. It follows from this, we think, that the nature of the trial is determined from the entire pleadings, rather than from the complaint alone.

The second and third cause of action in the complaint, and the second separate defense in the answer, presented of course purely legal questions. But they were matters growing out of the principal transaction or connected with it in such a way as to be triable with the equitable branch of the case in order to avoid a multiplicity of suits.

We conclude, therefore, that there was no error in the order of the court, and that the judgment must stand affirmed.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8528. Department Two. March 4, 1910.]

# C. M. SHAW *et al.*, *Respondents*, v. L. E. SPENCER *et al.*, *Appellants*.[1]

JUDGES—POWERS OUTSIDE COUNTY—NEW TRIAL—PLACE OF HEARING. Under Rem. & Bal. Code, § 41, a judge of the superior court cannot properly hear a motion for a new trial outside of the county wherein the cause is pending, except by consent of the parties.

APPEAL—REVIEW—HARMLESS ERROR—NEW TRIAL. Where a cause is heard *de novo* on appeal, irregularity in hearing a motion for a new trial outside of the county wherein the cause is tried is without prejudice, if the new trial was properly denied.

MECHANICS' LIENS — LEASEHOLDS — INTERESTS LIABLE — IMPROVEMENTS BY LESSEE—ESTOPPEL OF OWNER. While ordinarily the estate of the lessor is not subject to mechanics' liens for improvements made by the lessee, the owner is estopped to contest mechanics' liens for improvements made by a lessee, where it appears that the public records did not disclose the lessee's interest in the demised premises, that the owner knew of the lessee's bad reputation and inability to carry out his contracts and must have anticipated his failure and the forfeiture of the leasehold, that the owner was constantly about the building during the progress of the work giving orders, paying bills when necessary to retain carpenters, and assuring them that their bills would be paid, and knew that his warning notices were immediately torn down.

SAME. The same estoppel would apply to a lien for material furnished under an agreement that the owner was to pay one-fourth of the cost, which he did and received a release from further liability.

SAME—PERSONAL LIABILITY. In an action to foreclose a mechanics' lien for improvements made by a lessee, personal judgment cannot be rendered against the lessor, where he contracted none of the debts, although he had estopped himself from confining the liens to the leasehold interest of the lessee.

Appeal from a judgment of the superior court for King county, Holcomb, J., entered July 2, 1909, in favor of the plaintiffs, in an action to foreclose mechanics' liens, after a trial before the court without a jury. Modified.

[1]Reported in 107 Pac. 383.

*Robert F. Booth* and *O. B. Thorgrimson*, for appellants.

*O. L. Willett*, *Jesse A. Frye*, and *George H. King*, for respondents.

RUDKIN, C. J.—On and prior to the 30th day of September, 1907, the Seattle and Montana Railroad Company was the owner of lot 4, of block 25, of A. A. Denny's addition to Seattle, together with the four-story building situate thereon, locally known as the Bon Marche Annex. On the above date, the railroad company leased the lot and building to the defendant L. E. Spencer, for the term of fifteen years, with an option to purchase. On the 19th day of September, 1907, while the negotiations for the lease from the railroad company were pending, Spencer, under the name of The Spencer Company, entered into an agreement with one Herman Quandt, by the terms of which Spencer agreed to sublet the first floor and a part of the basement of the building to Quandt, for a term of ten years, at the monthly rental of $700 per month for the first five years, and $900 per month for the remainder of the term, the term to commence November 1, 1907. Pursuant to this agreement, Spencer individually executed a lease to Quandt on the 3d day of October, 1907, for the ten-year term, the lease providing that the payment of rent should begin as soon as the subtenant opened the demised premises for business, not later, however, than December 1, 1907.

In the latter part of September or early part of October, 1907, Quandt took possession of the premises described in his lease, and made extensive improvements in fitting them up for restaurant and cafe purposes. In making the improvements, all material was furnished and all labor employed in the name of the Tivoli Catering Company, of which Quandt was the ostensible manager. At the time the improvements started, there was no such concern as the Tivoli Catering Company, but sometime thereafter a corporation by that name was organized, with Spencer, Madole, and Lupton as

incorporators. It does not appear that any of the capital stock of this corporation was subscribed, or that its organization was perfected beyond the filing of its articles. On or about the 1st day of January, 1908, Quandt abandoned the premises, or was ousted therefrom for failure to pay rent; and soon thereafter the plaintiffs and interveners commenced their several actions to foreclose liens for labor performed and material furnished in making the repairs and improvements above referred to. From a personal judgment in favor of the several lien claimants against Spencer, Quandt, and the Tivoli Catering Company, and a decree of foreclosure against the leasehold interest of Spencer and his assigns, this appeal is prosecuted.

The case was heard in the court below before Judge Holcomb of Adams county. After his return to Ritzville, the judge heard and denied a motion for a new trial, interposed by the appellants, and upon this ruling the first error is assigned. After providing that superior judges may make and sign certain orders outside of their respective counties, section 1 of Laws of 1901, p. 76 (Rem. & Bal. Code, § 41), expressly provides, "That nothing herein contained shall authorize the judge to hear any matter outside of the county wherein the cause or proceeding is pending, except by consent of the parties." Under this provision, a judge of the superior court cannot properly hear a motion for a new trial outside of the county wherein the cause is pending, except by consent of the parties, and the action of the trial judge in this respect was irregular; but the case is heard here *de novo*, and no prejudice has resulted to any party in interest, if the new trial was properly denied.

It is next contended that the court erred in subjecting the leasehold estate of Spencer and his assigns to the several lien claims. Ordinarily the estate of the lessor is not subject to liens for improvements made on the demised premises by the lessee during his term, unless the improvements are made

under some contract or agreement with the lessor; but we think that the appellant Spencer has, by his conduct and course of dealing, estopped himself from claiming the exemption. The agreement for a lease between the Spencer Company and Quandt was recorded, but the Spencer Company was not connected with the record title, and therefore the public records disclosed no interest in the demised premises in either Quandt or the Tivoli Catering Company. Before entering into the agreement with Quandt, Spencer was informed by his attorney that Quandt's reputation was exceedingly bad—to use his own expressive words, that he had committed every crime known to the law, except suicide. Spencer knew that the labor was performed for and the material furnished to a concern that had no interest in the property, a concern that had no existence in law or in fact. He knew that Quandt had no means to carry out his contract, and was unable to pay his labor and material bills as they became due. He was about the building constantly as the work progressed, giving orders, paying bills when necessary to retain the carpenters, assuring them that their bills would be paid when they threatened to quit, etc. True, he says he thought Quandt would be able to sell his lease to raise money to pay the bills, but it does not appear that the leasehold interest had any value beyond the rents reserved, and the circumstances must have convinced Spencer that it was only a matter of a short time at best before the leasehold estate would be forfeited for nonpayment of rent and the improvements restored to him. In fact, it would not be going too far, on the face of this record, to say that he must have anticipated just such an event. He says he posted notices warning laborers and materialmen that he would not be responsible for their claims, but if such notices were in fact posted, he also knew that they were immediately torn down and destroyed by Quandt or some other person. In short, he was using every effort to insure a completion of the

improvements and to avoid responsibility for the costs. Under the circumstances of this case, we have no hesitation in saying that this part of the judgment is clearly correct, and should be affirmed.

The Slaughter lien is attacked on the further ground that Spencer agreed to pay one-fourth of the cost of a certain metal ceiling, for which the lien was filed, and that he has paid the same and obtained a release from further liability. If we are correct in our conclusion that the leasehold estate of Spencer is subject to the debts contracted by Quandt and the Tivoli Catering Company, the same rule will apply to this claim.

The rendition of a personal judgment against Spencer is also assigned as error. This assignment must be sustained. He personally contracted none of the debts. Indeed, the pleadings of some of the lien claimants would preclude us from rendering such a judgment in their favor. The respondents, however, have no material interest in this feature of the case, and the judgment will be modified by eliminating the personal part of it, without cost to them. As thus modified, the judgment is affirmed, and no cost will be allowed on the appeal.

DUNBAR, PARKER, MOUNT, and CROW, JJ., concur.

[No. 8510. Department One. March 9, 1910.]

# HUGH MONROE *et al.*, *Respondents*, v. W. C. STAYT *et al.*, *Appellants*.[1]

LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE—UNLAWFUL DETAINER—HUSBAND AND WIFE—COMMUNITY RELATION. Where premises leased by a husband alone were occupied by the husband and wife and rent paid for the full term, the wife is estopped, as a member of the community, from disputing the title of the landlord, in an action for unlawful detainer, notwithstanding that the community relation was not considered in making the lease and that she did not sign the lease.

LANDLORD AND TENANT—UNLAWFUL DETAINER—TITLE OF PLAINTIFF. The title of the plaintiff cannot be tried out in an action of unlawful detainer of demised premises.

HUSBAND AND WIFE—COMMUNITY PROPERTY—INCUMBRANCES. A promise by a husband to pay rent is not an incumbrance of community real estate, within Rem. & Bal. Code, § 5918, providing that the husband cannot incumber the same without the wife's consent.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered November 21, 1908, upon the verdict of a jury rendered in favor of the plaintiffs, by direction of the court, in an action of unlawful detainer. Affirmed.

*C. J. Webb* and *W. C. Stayt*, for appellants.

*Post, Avery & Higgins* and *Jesseph & Grinstead*, for respondents.

CHADWICK, J.—Plaintiffs brought this action to recover possession of certain town lots in the town of Kettle Falls. The property was held under a lease executed by plaintiff Hugh Monroe, who it is admitted was acting as well for his wife as for himself. The term of the lease was six months, and the stipulated rent was $10 per month, payable in advance. The lease was signed by defendant W. C. Stayt

[1]Reported in 107 Pac. 517.

alone, who with his wife thereafter occupied the property under the lease, paying rent for the full term. Upon its expiration they refused to pay rent for a longer time, and refused to quit or vacate the possession of the property on demand.

In answer to a complaint drawn under the forcible entry and detainer statute, defendants set up the several defenses: That W. C. Stayt did not act for and in behalf of his wife in the acceptance of the lease; that she never signed the lease or agreed to its terms, and for that reason the community was not bound thereby; that at the time the lease was executed, the defendants as a community were in the lawful, peaceable, and quiet possession of the property as owners thereof, and at the time were disputing the ownership and rights of plaintiffs; that the lease was executed upon the express understanding that it should not affect the ownership or property rights of either party to it; that defendant Elizabeth M. Stayt refused to sign or enter into the lease, which fact was well known to the plaintiff Hugh Monroe. The case went to trial upon these issues, and resulted in a judgment in favor of the plaintiffs. Defendants have appealed.

The rulings of the trial court were based upon the theory that appellants were estopped to deny respondents' title. While many assignments of error are made, the determination of the case must rest upon the answer to the question whether the wife, who is a member of the community and who with her husband enters into possession of leased property, is bound by the act and agreement of her husband as evidenced by the paper writing. Appellants do not deny, but say that "where the husband leases property from a stranger and he and his wife enter into the possession of the property under the lease, the wife cannot dispute the title of the third party from whom possession was acquired, nor can the community dispute such title, for, in such cases, not only

the husband, but also the wife, and the community composed of husband and wife, have entered into the possession of the property under the lease, and in such cases the wife became the party privy to the lease, and is, therefore, equally bound with the husband." The point is then made that, before the respondents can recover, they must show that the relation of landlord and tenant exists between them and appellants as a community; that such relation does not grow out of the occupancy or possession, but must exist as the result of a contract; that the wife not having entered into the written contract, the community is not bound, and therefore appellants have a right to set up their equitable defenses.

The case of *Shew v. Call*, 119 N. C. 450, 26 S. E. 33, 56 Am. St. 678, is relied on. There the husband rented property and paid rent to the owner. It was held, under the facts of the case, that the relation of landlord and tenant did not exist. Aside from the fact that it was an action to cancel a deed, and not controlling as an authority in this kind of a case, the law is settled in this state. In a case where the right to recover in an action of unlawful detainer was challenged upon the ground that there was no written lease or contract establishing the relation of landlord and tenant, it was held that an occupancy such as we have here created the relation. *Oregon & Washington R. Co. v. Vulcan Iron Works*, *ante* p. 372, 106 Pac. 1120. The court there said:

"All the essential elements of a tenancy would seem to exist, unless we sacrifice substance to a mere form; and while only a landlord may avail himself of the summary proceeding by unlawful detainer, the relation of landlord and tenant may exist or be created without an express contract."

Mrs. Stayt, having adopted and acted upon the contract of her husband, comes within the general rule and, like her husband, is estopped to deny the title of the landlord, and this irrespective of the fact that the community relationship existing between her husband and herself was not considered when the contract was entered into. Both appellants being

bound by the lease, their title, if they have any, cannot be tried out in this form of action. *Meyer v. Beyer*, 43 Wash. 368, 86 Pac. 661; *Carlson v. Curran*, 42 Wash. 647, 85 Pac. 627, 6 L. R. A. (N. S.) 260; *McGrew v. Lamb*, 31 Wash. 485, 72 Pac. 100; *Gore v. Altice*, 33 Wash. 335, 74 Pac. 556; *Chexum v. Campbell*, 42 Wash. 560, 85 Pac. 48; *Morris v. Healy Lumber Co.*, 33 Wash. 451, 74 Pac. 662; *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97; *Phillips v. Port Townsend Lodge, F. & A. M.*, 8 Wash. 529, 36 Pac. 476.

Neither did the court err in refusing to hear the testimony of a third party, to the effect that Mrs. Stayt had refused to sign the lease. Having occupied the premises under the contract of her husband, who was competent to contract in her behalf, it was immaterial whether she signed the lease or not.

We have not overlooked the contention that the husband could not bind the wife as a lessee under Rem. & Bal. Code, § 5918, wherein it is provided that the husband shall not sell, convey, or incumber the community real property unless the wife joins in the deed or instrument evidencing the conveyance or incumbrance. This section can have no possible application to this case. The promise to pay rent for demised premises is not an incumbrance of community real property.

The judgment is affirmed.

RUDKIN, C. J., GOSE, FULLERTON, and MORRIS, JJ., concur.

[No. 8516. Department Two. March 9, 1910.]

## CEDAR RAPIDS NATIONAL BANK, *Appellant*, v. MYHRE BROTHERS *et al.*, *Respondents*.[1]

BILLS AND NOTES—HOLDER IN GOOD FAITH—BURDEN OF PROOF. In an action upon a promissory note, defended on the ground of failure of consideration, breach of warranty and fraud in its inception, clearly established by the evidence, the burden of proof is upon the plaintiff to show that it is the holder in good faith, under Rem. & Bal. Code, § 3450, so providing as to a holder in due course, when it is shown that the title of the person who negotiated it is defective, and Id. § 3443, defining a holder in due course.

APPEAL—REVIEW—VERDICTS. A verdict upon conflicting evidence will not be disturbed on appeal if there was sufficient testimony for legal consideration by the jury.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered May 17, 1909, upon the verdict of a jury rendered in favor of the defendants, in an action on a promissory note. Affirmed.

*Munter & Lovejoy*, for appellant.

*Davis & Davis*, for respondents.

PER CURIAM.—This is an action brought by appellant bank against the respondents, Myhre Brothers, to recover on a promissory note for $234, executed and delivered by respondents to the Sterling Manufacturing Company, and by said corporation transferred by indorsement before maturity. The note was given in payment for a consignment of jewelry. Respondents defended the action on the ground of failure of consideration, breach of implied warranty, and fraud in the inception of the instrument sued on, and denied that appellant was an innocent purchaser for the value before maturity in the usual course of business. The case was submitted to a jury, who returned a verdict in favor of respondents, the defendants in the action below.

[1]Reported in 107 Pac. 518.

The testimony is overwhelming that the jewelry was worthless, and that the note was obtained by misrepresentation and fraud. The second question involved is, was the plaintiff bank the holder of the note in due course. Section 59 of the negotiable instruments law, Laws 1899, p. 351 (Rem. & Bal. Code, § 3450), is as follows:

"Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course."

And section 52 of the same act (Rem. & Bal. Code, § 3443) is as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

So it appears that the burden was upon the plaintiff in this case to show that it was a holder in good faith, and the question of whether or not that burden was successfully met was one which was submitted to the jury, and by its verdict it has decided that question against the appellant. On both questions involved there was sufficient testimony for the legal consideration of the jury, and their verdict will therefore not be disturbed.

Notwithstanding the many assignments, we are not able to discover any error on the part of the court in admitting or rejecting testimony, or in giving or refusing instructions. The judgment is affirmed.

[No. 8548. Department Two. March 10, 1910.]

FRANK P. O'BRIEN, *Appellant*, v. AMERICAN CASUALTY COMPANY *et al.*, *Respondents*.[1]

NEW TRIAL—MOTION—TIME FOR. Where plaintiff is satisfied with a verdict, but the court enters judgment inconsistent therewith, he is then for the first time called upon to move for a new trial.

SAME—EXTENSION OF TIME. The time for making a motion for a new trial may be extended by the court.

APPEAL—STATEMENT OF FACTS—TIME FOR. Where a motion for a new trial is seasonably made, the time for taking an appeal or filing a statement of facts does not begin to run until the motion is denied.

NEW TRIAL—RIGHT TO MOVE FOR. The fact that a party could have appealed from a judgment *non obstante veredicto* does not deprive him of his right to move for a new trial.

Motions to strike a statement of facts, filed in the supreme court February 19 and 21, 1910. Denied.

*H. R. Lea*, for appellant.

*Hayden & Langhorne*, for respondent Wheeler.

*F. S. Blattner* and *L. B. da Ponte*, for respondents American Casualty Company *et al.*

PER CURIAM.—This action was commenced by plaintiff O'Brien against the American Casualty Company, Lumbermans and Manufacturers Hospital Association, and Dr. Ernest C. Wheeler, to recover damages by reason of the alleged negligence and malpractice of each of the defendants. Respondent Wheeler appeared separately from the other defendants. On April 7, 1909, a verdict was rendered, the jury finding in favor of the plaintiff and against the defendant American Casualty Company in the sum of $2,000, against the defendant Lumbermans and Manufacturers Hospital Association in the sum of $4,000, and against the defendant Dr. Ernest C. Wheeler in the sum of $1,000.

[1]Reported in 107 Pac. 519.

On April 8, 1909, the respondents American Casualty Company and the Lumbermans and Manufacturers Hospital Association filed a motion to set aside the verdict, and also a motion for judgment *non obstante*. On April 8, 1909, stipulation was entered into by the plaintiff and the defendants American Casualty Company and the Lumbermans and Manufacturers Hospital Association, extending the time for filing motions and objections for a period of twenty days from and after the date of the verdict of the jury. On May 6, 1909, the plaintiff O'Brien filed a motion for judgment upon the special findings and verdict of the jury. On July 6, the judge before whom the case was tried filed a written decision denying the motion of plaintiff for judgment, but entered an order sustaining in part the motion of the defendants Lumbermans and Manufacturers Hospital Association and the American Casualty Company for judgment notwithstanding the verdict. A judgment was entered against all of the defendants for $1,000 only, and on the same date an order was entered denying the plaintiff O'Brien's motion for judgment. After the judge had filed his written decision, which was on July 6, the plaintiff, on July 7, asked and received an extension of twenty days for the purpose of studying the decision and moving for a new trial. The motion was made within the twenty days. On September 21, the plaintiff's motion for a new trial was denied. On September 25, the plaintiff served notice of appeal to the supreme court, on the 27th filed its appeal bond, and on November 10 asked and received an order granting leave to file a bill of exceptions, which was allowed. This motion is to strike the statement of facts, for the reason that defendants were not served within the time prescribed by law.

We think there is no merit in this motion. The statute, Rem. & Bal. Code, § 402, provides that the party moving for a new trial must, within two days after the verdict of a jury if the action is tried by a jury, or two days after notice in writing of the court or referee if the action is tried without

a jury, file with the clerk and serve upon the adverse party his motion for a new trial, etc. There is no question but that it is the duty, under the provisions of the statute, for a party who desires a new trial to file motion for same within two days after the rendition of the verdict. But the plaintiff in this case did not desire a new trial. On the contrary, as respondent Wheeler states in his brief, he was satisfied with the verdict of the jury. He would have imperilled his case if he had asked for a new trial, for the respondents would undoubtedly have joined in the motion, and under such circumstances the court would have granted it. In fact, the respondents did move for a new trial on the 8th of April. It is not complimentary to the law to contend that it imposes such a burden on the appellant under the circumstances shown by the record. He did what he should have done—asked for judgment on the verdict, and when that motion was denied, the verdict of the jury was virtually set aside and a judgment rendered by the court which was inconsistent with the verdict of the jury, and which was in effect the result of a trial by the court. The appellant was, for the first time, called upon to make a motion for a new trial, and he seasonably asked for time to make that motion, or any motion which might seem desirable. The court had the power to extend the time, *Bailey v. Drake*, 12 Wash. 99, 40 Pac. 631; *Leavenworth v. Billings*, 26 Wash. 1, 66 Pac. 107, and under the rule announced by the first case cited, the court had power to extend the time after the statutory time for the filing of the motion had expired. The court did extend the time. Within that time motion was made, and was denied on September 21, 1909, and it is not claimed that the appeal was not perfected in time if the time began to run on the last mentioned date. We think it did.

It is contended by the respondent that the motion for a new trial is, in effect, a motion to vacate the judgment entered by the court, and *Pedigo v. Fuller*, 37 Wash. 529, 79 Pac. 1129, is relied upon to sustain that contention. Of

course, a motion for a new trial to a certain extent always involves the same questions which were tried out in the original case, and it is for the express purpose of obtaining a different verdict or a different judgment that the motion is made. But the abuse which was sought to be avoided by the decision in *Pedigo v. Fuller*, *supra*, is not found in the action of the appellant in this case. There, nearly three years after the judgment, which was a default judgment by the court, had been entered, the defendants made a motion to vacate the judgment. This motion was denied on July 14, 1903. Thereafter on September 22 of the same year, the defendants filed what this court termed a so-called petition for a reconsideration of the order denying the motion to vacate, which was refused, and we sustained the lower court in such refusal because it appeared that the second motion was in effect the same as the first, and it was held that the time for appeal could not be extended by such methods.

But very different is this case, where the motion for a new trial is made at the very first opportunity. It is true that the plaintiff could have appealed from the judgment *non obstante veredicto*; but he had a right to interpose a motion for a new trial, and could not be deprived of it. The proceedings in this case are somewhat involved, the plaintiff's motion for judgment on the verdict and defendant's motion for judgment *non obstante* being determined at the same time, which as we have seen distinguishes the case from the plain, ordinary case contemplated by § 402, which provides that the motion must be made within two days, etc. Under all the circumstances of this case, it would be an injustice to strike appellant's statement of facts. The motion is therefore denied.

[No. 8520. Department Two. March 10, 1910.]

# THE STATE OF WASHINGTON, *Respondent*, v. THE CITY OF SEATTLE *et al.*, *Appellants*.[1]

PUBLIC LANDS — UNIVERSITY LANDS — POWER TO DISPOSE OF — REGENTS. The acts of the territorial legislature authorizing the board of regents of the state university to sell the old university site at public auction under specified restrictions did not empower the board by resolution to give the use of a strip along an alley to the abutting owners nor to dedicate the strip for a public street.

MUNICIPAL CORPORATIONS — STREETS — PRESCRIPTIVE RIGHTS — NATURE. The prescriptive right to a public street by adverse possession does not involve any property rights of the city in which the street is located.

CONSTITUTIONAL LAW — VESTED RIGHTS — LIMITATIONS — REPEAL — RIGHTS IN STREETS. The legislature has the power, even after the statute of limitations has run, to take away from a city the right to plead the statute in respect to adverse possession of a city street, as the matter is one of public concern only, and not a property right of the city.

MUNICIPAL CORPORATIONS — STREETS — RIGHTS OF ABUTTERS — CONSTITUTIONAL LAW — PROPERTY. Owners of lots abutting on a street have a special interest in the use of the street which is distinct from that of the public generally and which constitutes property.

ADVERSE POSSESSION — SCHOOL LANDS — HELD IN TRUST — LIMITATIONS — HIGHWAYS — PRESCRIPTION AGAINST STATE — GRANTS — EFFECT. Under the enabling act and the constitution providing that all lands granted to the state for educational purposes shall be held in trust for all the people and sold or disposed of only at public auction for the full market value, lands donated to the late territory for a university site cannot be acquired from the state by adverse possession, notwithstanding a provision that statutes of limitations generally shall run against the state, where the donors, in subsequently authorizing the regents to sell the lands in the interests of the university, and the legislature in accepting, imposed restrictions not materially different from those of the enabling act and the constitution; since the state accepted the trust and covenanted with the donors to apply the land to certain uses only, and no title can be acquired by adverse possession against the state in the absence of a provision making the state subject to the limitation.

HIGHWAYS — PRESCRIPTIVE USE — ESSENTIALS. Rem. & Bal. Code, § 5657, declaring public highways that have been used for seven years

[1]Reported in 107 Pac. 827.

to be lawful roads, where the same have been kept up at public expense, is only a statute of limitations, and has no application where the road has not been kept up at public expense.

Appeal from a judgment of the superior court for King county, Main, J., entered July 14, 1909, upon findings in favor of the plaintiff, after a trial on the merits. Affirmed.

*Scott Calhoun, Bruce C. Shorts, Leander T. Turner*, and *Sandford C. Rose*, for appellants, contended, among other things, that public highways can be established by adverse use. *State v. Horlacher*, 16 Wash. 325, 47 Pac. 748; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858. Vested rights are acquired when the statute of limitations has run. 25 Cyc. 988; 8 Cyc. 922, 1012; *Seattle v. De Wolfe*, 17 Wash. 349, 49 Pac. 553; *Packscher v. Fuller*, 6 Wash. 534, 33 Pac. 875; *Grigsby v. Peak*, 57 Tex. 142; *State v. Aberdeen*, 34 Wash. 61, 74 Pac. 1022. Public lands may be acquired by prescription and acquiescence. *Board of Comr's of Greene County v. Huff*, 91 Ind. 333; *Dimon v. People*, 17 Ill. 416; 22 Am. & Eng. Ency. Law (2d ed.), p. 1189; *City of Laredo v. Martin*, 52 Tex. 548; *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132; *Piper v. Richardson*, 9 Met. 155; *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 25 N. E. 605, 9 L. R. A. 510. The 34-foot strip has become a street by estoppel, which applies against the state. *United States v. Stinson*, 125 Fed. 907; *Northern Pac. R. Co. v. Ely*, 25 Wash. 384, 65 Pac. 555, 87 Am. St. 766, 54 L. R. A. 526; *Forster v. Raznik*, 46 Wash. 692, 91 Pac. 252. Property devoted to one public use may be claimed for another public use by prescription or estoppel. *Prudden v. Lindsley*, 29 N. J. Eq. 615; *Board of Com'rs of Greene County v. Huff*, *supra*.

*The Attorney General, M. M. Lyter*, and *Douglas, Lane & Douglas*, for respondent, contended, *inter alia*, that the statute of limitations cannot run against the state where the state has no power of alienation as to the specific property,

regardless of the fact that the statute purports to run against the state. 1 Cyc. 1113; *Ralston v. Weston*, 46 W. Va. 541, 76 Am. St. 834; *Sollers v. Sollers*, 77 Md. 148, 26 Atl. 188, 39 Am. St. 404, 20 L. R. A. 94. The state having no power to make the grant, the presumption of a grant is not raised by prescription. *Donahue v. State*, 112 N. Y. 142, 19 N. E. 419, 2 L. R. A. 576; *Norrell v. Augusta R. & Elec. Co.*, 116 Ga. 313, 42 S. E. 466, 59 L. R. A. 101; *Simplot v. Chicago etc. R. Co.*, 16 Fed. 350. Lands dedicated to a particular public use, the state holding as a trustee for the people and in its sovereign capacity as a proprietor, cannot be acquired by adverse possession, regardless of the fact that the statute of limitations applies to the state as well as individuals. *West Seattle v. West Seattle Land and Imp. Co.*, 38 Wash. 359, 80 Pac. 549; *Hoadley v. San Francisco*, 50 Cal. 265; *Yolo County v. Barney*, 79 Cal. 375, 21 Pac. 833, 12 Am. St. 152; *Board of Education of San Francisco v. Martin*, 92 Cal. 209, 28 Pac. 799; *City and County of San Francisco v. Straut*, 84 Cal. 124, 24 Pac. 814; See, also, *Bolster v. Ithaca St. R. Co.*, 79 App. Div. 239, 79 N. Y. Supp. 597; *Phipps v. State*, 7 Blackf. (Ind.) 512.

PARKER, J.—This is a suit to quiet title, prosecuted by the attorney general in behalf of the state against a large number of defendants. A decree was rendered in favor of the state. The defendants City of Seattle, Lippy, and Crawford have appealed.

The land involved in this appeal consists of a strip of land 34 feet wide extending from Seneca to Union Streets, and lying immediately on the west of the alley between 5th and 6th avenues, in the city of Seattle. The state claims title to the land under a deed granting to the territory of Washington a ten-acre tract of land as a site for the territorial university, which grant includes this strip. The city claims the strip has become a part of a public street con-

sisting of the alley and the strip, in all fifty feet wide. The other appellants claim special interest, as a property right, in having the street maintained at the full width of the fifty feet, because they are the owners of lots abutting upon the easterly side of the alley.

The principal reliance of appellants, in support of their contention that the land in question is part of a public street, is upon the ground that it has become such by prescription. There is room for argument as to whether or not the evidence shows such a use of the strip as to make it a part of a public highway by prescription, if that contention was being made against the rights of private parties instead of the state. We think, however, that there are undisputed facts, shown by the record, sufficient to determine the rights of the parties independently of that question. These facts relate to the history and nature of the title acquired by the state in the land, and are as follows: In December, 1860, the territorial legislature passed an act (Laws of 1860-61, p. 4) providing as follows:

"Section 1. Be it enacted by the Legislative Assembly of Washington Territory, That the Territorial University be, and the same is hereby located and established at Seattle, in King county: Provided, a good and sufficient deed to ten acres of land, eligibly situated in the vicinity of Seattle, be first executed to the Territory of Washington for University purposes."

Later at the same session, in January, 1861, an act was passed (Laws 1860-61, p. 17) providing, among other things, as follows:

"Sec. 1. Be it enacted by the Legislative Assembly of the Territory of Washington, That Daniel Bagley, John Webster and Edmund Carr be, and they are hereby constituted and appointed a board of commissioners to select, locate and receive a title for ten acres of land within the vicinity of Seattle, that may be donated to the Territory of Washington for a site for the Territorial University. . . ."

Thereafter Arthur Denny and others deeded to the terri-

tory a ten-acre tract of land including the strip here involved, to be used as a site for the university. These deeds refer to the legislative provisions locating the university at Seattle, and contain recitals clearly evidencing an intent to restrict the use of the ten acres to that of a site for the university. Thereafter the university was established upon the tract, and it was enclosed by a fence following the outer lines of the tract. At a meeting of the regents of the university, held on August 1, 1873, action was taken by them and recorded in the journal of their proceedings as follows:

"Ordered that on petition of the residents adjoining the east and west sides of the University grounds, that they be authorized to appropriate so much of the University grounds as may be necessary to make a street fifty feet wide on each side, inclusive of alleys, provided that said residents shall erect a good substantial fence on the grounds, as good at least as the one first erected, within five months next ensuing."

Soon thereafter, the residents and persons at whose instance this action was taken moved the fence on the easterly line, back upon the university grounds 34 feet, and reconstructed it there to the satisfaction of the regents. This, it is claimed by appellants, marked the beginning of the use of the strip which has converted it into a public street by prescription. Early in 1891 it was contemplated moving the university to its present location, and to the end that the restriction upon the alienation of the original site might be removed, and that it might be disposed of for the benefit of the university, the original donors of the part of the land here involved, executed a deed to the state containing conditions and restrictions as follows:

"This grant is upon the following conditions to be kept and performed by second party. Second party shall cause to be duly passed by its State Legislature and approved by its Governor, proper enactments authorizing said second party by its proper officers to purchase or otherwise procure the fee to sufficient lands within six miles of the present so-

called University site in said City of Seattle; said lands to be forever used exclusively for a State University purposes and shall be in a compact body of not less than 100 acres in extent:

"That said enactments shall further authorize second party to contract for the sale of the lands comprising the present so-called University site in said City of Seattle of which the aforesaid described lands are a part and parcel at such time as the said second party shall have procured by its proper officers other lands for the State University purposes. That said enactments shall authorize the sale of the lands hereinbefore described in such parcels and for such prices as may be most advantageous to the interests of the said State University. . . .

"Further provided that all the proceeds of the sale or sales of the lands constituting the present so-called University site in said City of Seattle shall be used—

"1st, for the purchase of other lands for a State University purposes as hereinabove provided.

"2nd, for the erection of necessary and suitable buildings thereon for a State University purposes and the improvement of said lands.

"3rd, the balance to be invested in such manner as the State Legislature may prescribe, the interest arising therefrom to be used in the support and maintenance of said University. Provided, however, that the principal may be used in the erection of additional University Buildings on said lands. That said enactments shall also provide that sufficient of the present so-called University site in said City of Seattle shall continue to be used for a State University purposes until such time as other suitable buildings are erected upon the lands to be procured under the terms and conditions of this Grant and said Legislative enactments.

"This deed shall become operative according to its terms and conditions at such time as second party shall cause enactments to be passed and approved as aforesaid, authorizing the fulfillment of the terms and conditions of this instrument."

Thereafter, by the Laws of 1891, p. 229, and the Laws of 1893, p. 293, the legislature accepted this deed, and provided for the establishing of the university at its present lo-

cation. By section seven (Laws of 1893, p. 297), it is, among other things, provided:

"The board of regents may, by decision of six-eighths of their number, duly ascertained by aye and nay vote, which shall be recorded in their minutes, proceed to sell the ten acres in the city of Seattle known as the 'university grounds,' which have been deeded to the state by A. A. Denny and others, which deeds are hereby accepted and made a part of this act. Such sale shall be made at public auction only, and the said board of regents may sell the whole of said tract of ten acres or it may cause same to be subdivided into lots and blocks, with streets and alleys conforming to the plan of the said city adjoining. No part of the said ten acre tract shall be sold until 'the value thereof, less the improvement, shall be appraised' by three appraisers, one to be appointed by the governor, one by the mayor of Seattle, and one by the board of regents, who shall be paid a reasonable compensation for their services out of the university fund. No public auction shall be held and no sale of any part of the said ten acres shall be made until after the board of regents has given notice of the time, place and terms of the sale, by publication for four successive weeks in one daily paper at Spokane, one in Walla Walla, one in Olympia, one in Port Townsend, one in Whatcom, one in Tacoma and one in Seattle."

We have reviewed the history of the acquisition of this land by the territory and state, together with the legislation touching its management and disposition, in order that we may have before us the exact nature and purpose of the grant, and the terms upon which the territory and state accepted it.

Whether the action of the regents in 1873 be considered as an attempt to give the use of this strip to the adjoining owners, as the terms of the resolution seem to imply, or as an attempted dedication of a public street, it is clear that, under the law as then existing, the regents had no power to do either. Learned counsel for appellant do not seriously contend to the contrary, but argue that the action of the regents

characterized the use, which it is claimed then commenced and continued, for sufficient time to constitute the strip a part of a public highway by prescription. The question then, in any event, is one of prescription and adverse use only; the resolution of the regents and the action of the residents thereunder being only material as a circumstance tending to show the commencement of such use. We will not attempt to answer the somewhat uncertain question of fact as to the extent of the use of this strip as a part of a public street, but will attempt to answer the inquiry, Can the state be divested of its title and right to the use of this land for the purpose it was granted, by prescription or adverse possession?

From 1854 to 1903 our law limiting the time for the commencement of actions, including actions to recover real property, provided that such limitation should "apply to actions brought in the name of the state . . . or for its benefit, in the same manner as to actions by private parties." Ballinger's Code, § 4807; Abbott, Real Property Statutes, pp. 130-137.

In 1903 (Laws of 1903, p. 26; Rem. & Bal. Code, § 167), the legislature amended § 4807 of Bal. Code, so as to read as follows:

"The limitations prescribed in this act (chapter) shall apply to actions brought in the name or for the benefit of any county or other municipality or *quasi* municipality of the state, in the same manner as to actions brought by private parties: *Provided*, That there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: *And further provided*, That no previously existing statute of limitation shall be interposed as a defense to any action brought in the name of or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to the adoption of this act, nor shall any cause of action against the state be predicated upon such a statute. An action shall be deemed commenced when the complaint is filed."

For the purpose of avoiding the effect of this amendment upon the rights of appellants, it is contended that the statute had run its course prior to 1893, and therefore the rights of the appellants having become vested, the change in the application of the statute of limitations to the state could not revive a cause of action in behalf of the state by which appellants could be divested of such rights. It may be conceded that whatever the effect of such change may be upon remedial rights only, it cannot have any effect upon property rights which have been acquired by prescription or adverse possession under the statute before the change. 25 Cyc. 988; Wood, Limitations (3d ed.), § 14; Cooley, Constitutional Limitations (7th ed.), 521.

So far as the appellant city of Seattle is concerned, its property rights are not here involved. It is the right and duty of the city to represent the public whenever it is sought by litigation to recover land within the bounds of what it claims to be a public street within the city, whether such claim be based upon prescription or dedication; but this is true because the statutory law of the state places in the city authorities the management and control of streets within the city, and not by reason of any property right existing in the city. Clearly the legislature has the power to take away from a municipality the right to plead the statutes of limitations whether the statute has run its full course or not, if the matter involved is only of public concern and does not involve any property right of the city. Whether or not the city could thus be divested of property rights acquired by adverse possession against the state prior to the change of the statute we need not determine.

In the case of *State v. Aberdeen*, 34 Wash. 61, 74 Pac. 1022, this court held that the amendment to § 4807 took away from the city the right to plead the statute of limitations, though the statute had run its course before the passage of the amendment. That was an action by the state to recover from the city the state's portion of liquor license fees

collected by the city to which the right of the state would have been barred had not the amendment of § 4807 removed the bar. The decision was based upon the principle that the legislature may compel municipalities to pay debts or claims not strictly binding in law, but which are just and equitable in their character and involve a moral obligation. The power of the city here involved being equally within the control of the legislature, we see no reason for holding that the right of the city to invoke the statute may not be limited by the legislature, even by an act passed after the statute has fully run and barred the right of the city but for its change or repeal.

In dealing with the rights of the other appellants, we are confronted with claims which are, in effect, property rights. These appellants base their claims upon the fact that they are owners of property abutting upon the street of which it is claimed the strip of land in controversy has become a part. The rights of such owners are different from the rights of the public generally in the street. Such rights are referred to in Elliott on Roads and Streets (2d ed.), p. 961, as follows:

"It is substantially agreed by the courts that the abutter has a private interest in the road or street as such, and if he has this right it is property which cannot be taken from him without compensation. The right to a road or street which the landowner possesses as one of the public is different from that which vests in him as an adjoining proprietor, and it is also distinct and different from his rights as owner of the servient estate. The right which an abutter enjoys as one of the public and in common with other citizens is not property in such a sense as to entitle him to compensation on the discontinuance of the road or street; but with respect to the right which he has in the highway as a means of enjoying the free and convenient use of his abutting property it is radically different, for this right is a special one. If this special right is of value—and it is of value if it increases the worth of his abutting premises,—then it is property, no matter whether it be of great or small value."

Now the rights of these private parties have been acquired, if at all, by the use of the street adverse to that contemplated in the grant of this land and its acceptance by the territory and state; and while the rights claimed are not technically rights claimed to have been acquired by their own adverse possession, yet, since they are property rights claimed to have been acquired by use adverse to the state and by lapse of time, we think the question must be determined by the law of adverse possession. And this brings us to the question, Did the statute of limitations, prior to the amendment of § 4807 in 1903, run against the state so that it could be divested of its title by adverse possession, in view of the purpose for which this land was acquired and held?

It is elementary that "In the absence of a provision making the state subject to the statute of limitations no title by adverse possession can be acquired against the state." 1 Cyc. 1112; 2 Enc. L. & P. 555; Wood, Limitations (3d ed.), § 52. Several decisions of this court have been rendered showing that the statute of limitations as it existed prior to 1903 did not, under all circumstances, run against the state though its provisions then existing might seem to so indicate.

In the case of *West Seattle v. West Seattle Land and Imp. Co.*, 38 Wash. 359, 80 Pac. 549, the defendant was claiming land by adverse possession which had been dedicated as a public street, and it was held that land so dedicated could not be acquired by adverse possession. At page 363, the court said: "The general rule is that a party cannot acquire title by adverse possession to property held by a municipality in its governmental capacity for public purposes." While this decision was rendered after the amendment of § 4807, it was, nevertheless, dealing with a right which was claimed to have become vested by ten-year possession prior to that amendment. In the case of *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278, it was held, that the state's title to the bed and shore land to navigable waters

could not be divested by adverse possession. This decision, however, was rested upon legislation which the court considered rendered all possession of such lands prior to sale by the state merely permissive, and hence such possession would not be construed as adverse to the state. In the case of *O'Brien v. Wilson*, 51 Wash. 52, 97 Pac. 1115, the court held that the state's title to its school lands granted by the government upon its admission to the Union was not subject to be lost by adverse possession, notwithstanding the general statute of limitations applied to the state. This decision was based upon certain provisions in the grant and certain provisions in the state constitution accepting the grant, which restricted the manner of the sale and disposition of the land and the use of the funds to be derived therefrom. By section 11 of the act for the admission of Washington to the Union, it is provided, "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools." 25 Stats. at Large, 676. And by sections 1 and 2 of article 16, of the state constitution accepting the grant, it is provided:

"Sec. 1. All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

"Sec. 2. None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; and the value thereof, less the improvements, shall, before any sale, be appraised by a board of appraisers, to be provided by law, the terms of payment

also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of improvements thereon shall be excluded."

A comparison of these provisions with those of the grant and acceptance thereof, here involved, we think will show no very material difference. The substance of the reason of the court's decision in that case can be found in the quotation therein of the language used by the supreme court of Minnesota, in the case of *Murtaugh v. Chicago etc. R. Co.*, 102 Minn. 52, 112 N. W. 860, 120 Am. St. 609 as follows:

"The state accepted the trust, and by its constitution solemnly covenanted with the United States to apply the granted lands to the sole use of its schools according to the purpose of the grant, and prohibited the sale of any portion of the granted land except at public sale. Such being the nature of the title of the state to its school lands, it is unthinkable that the legislature intended, by section 12, c. 66, G. S. 1866, and later acts amending it, to provide a way whereby the trust as to any of the school lands might be defeated, and title thereto acquired by adverse possession, contrary to the mandate of the constitution that title thereto could only be obtained by a public sale thereof."

Notwithstanding the decision in *O'Brien v. Wilson*, involved a grant of land from the United States for the benefit of the common schools, and an acceptance of that grant by constitutional provisions, it seems to us the principle there involved is applicable to this case. When the territory of Washington, in 1861, accepted the grant of this land to be used as a site for its university, and when thereafter, in 1891 and 1893, the state, by legislative enactment, accepted from the donor the deed removing the restrictions upon alienation of the tract, but with conditions therein to the effect that the state should by legislative enactment, authorize the sale of the land in such parcels and for such prices as may be most advantageous to the interest of the state university, and the further condition that the funds derived from such sale

should be devoted to the upbuilding and maintenance of the university, it accepted the trust and solemnly covenanted with the donors to apply the granted land to the sole use of the upbuilding of its university, according to the purpose and spirit of the grant, no less than when it accepted the grant from the government; and while the restrictions touching the manner of sale are not therein enumerated and prescribed with quite so much detail as in the government grant, the obligations thereby imposed upon the state, we think, are no less binding than as if the grant had come from the government instead of an individual, and the promise to abide by the spirit of the grant had been evidenced by constitutional instead of statutory enactments. It may be conceded that a grant of land in support of the common schools, such as the government grant is, is of somewhat more importance than a grant for the upbuilding and maintenance of a state university, but one is no less the property of the people than the other. We are of the opinion that the general statute of limitations, while in force against the state, did not have the effect of enabling property rights to be acquired, by adverse use or possession, in land held by the state for such public purpose as this land was acquired and held.

Some reliance is placed by counsel for appellants upon the case of *Peterson v. Baker*, 39 Wash. 275, 81 Pac. 681, and also *Smith v. Mitchell*, 21 Wash. 586, 58 Pac. 667, 75 Am. St. 858, where it was held that a public highway may be acquired by prescription over school lands granted by the government. But those decisions rest upon the provisions of the act of Congress expressly granting right of way for public highways over public lands.

Appellants also seek to maintain their rights under § 5657 of Rem. & Bal. Code, providing as follows:

"All public roads and highways in this state that have been used as such for a period of not less than seven years, and are now so used, where the same have been worked and kept up at the expense of the public, are hereby declared to

be lawful roads and highways within the meaning and intent of the laws now existing governing public roads and highways in this state."

This is only a statute of limitation, and in view of what has been said, the contention hardly needs further answer. However, it will be noticed that, in order to constitute a highway under this section, something more than mere use by the public is necessary. The road must have been worked and kept up at public expense; otherwise the section has no application. *Seattle v. Smithers*, 37 Wash. 119, 79 Pac. 615. A reading of the evidence in this case convinces us that, whatever may be here shown as to the use of this strip by the public, it is clear that there has been no such work or improvement put upon this land at the expense of the public as to bring it within the provisions of § 5657.

By § 7 of the act of 1893, above quoted, it will be noticed that the regents, as incident to their power to sell, may cause the land, "to be subdivided into lots and blocks, with streets and alleys conforming to the plan of the said city adjoining." We deem it not out of place to state that the evidence in this case shows that the dedication of this strip as a part of a public street would not conform to the plan of the city of Seattle surrounding this tract. The alley 16 feet wide, to which it is sought to add this strip, does conform, and had for years prior to the giving of the power of dedication to the regents conformed, to the plan of the city adjoining.

We are of the opinion that the judgment of the superior court should be affirmed. It is so ordered.

DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8564. Department One. March 18, 1910.]

JOHN W. MEEHAN, *Appellant*, v. J. M. SHIELDS *et al.*, *Respondents*.[1]

COUNTIES—POWERS—CONSTITUTIONAL LAW—HIGHWAYS—IMPROVEMENT. The provision of the constitution vesting in counties the right of local self-government is not violated by the state aid road law (Rem. & Bal. Code, § 5880) authorizing the construction of state aid roads under the direction of the state highway commissioner, upon plans adopted by the county commissioners, the expense to be paid in part by the county and the local road district.

TAXATION—UNIFORMITY—DIVERSION OF TAX—HIGHWAYS. The constitutional provisions requiring uniformity in taxation and the proper application of taxes are not violated by the state aid road law (Rem. & Bal. Code, § 5880) authorizing the highway commissioner to build state aid roads, 50 per cent of the cost to be paid from the state highway fund, 35 per cent from the county road and bridge fund, and 15 per cent from the local district road fund; since the cost is paid by the state, county, and district respectively benefited and taxed for moneys expended in their own territory.

CHADWICK, J., dissents.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered August 18, 1909, upon sustaining a demurrer to the complaint, dismissing an action to enjoin the execution of a contract for the improvement of a public highway. Affirmed.

*J. L. Corrigan*, for appellant, contended, *inter alia*, that the act violates the right of local self-government. *People ex rel. Board of Park Com'rs v. Common Council of Detroit*, 28 Mich. 227; *State ex rel. Smyth v. Moores*, 55 Neb. 480, 76 N. W. 175, 41 L. R. A. 624; *Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412; *State ex rel. McCagg v. Mayor etc. of Chicago*, 51 Ill. 17; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; *State ex rel. Egbert v. Blumberg*, 46 Wash.

[1]Reported in 107 Pac. 835.

270, 89 Pac. 708; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *Davies v. Board of Sup'rs of Saginaw County*, 89 Mich. 295, 50 N. W. 862; Cooley, Constitutional Limitations (4th ed.), ch. 8. The law diverts a portion of the county funds. *National Bank of Lawrence v. Barber*, 24 Kan. 534; *Attorney General v. Board of Supervisors of Bay County*, 34 Mich. 46. A law requiring or permitting a county to collect taxes and expend them for state purposes, or turn them over to state officials to be so spent, is void. Cooley, Taxation, ch. 5, pp. 140-145; *Board of Supervisors of Livingston County v. Weider*, 64 Ill. 427; *State, Baldwin, Pros. v. Fuller*, 39 N. J. L. 576; *Sleight v. People*, 74 Ill. 47; *Wasson v. Commissioners of Wayne County*, 49 Ohio St. 622, 32 N. E. 472, 17 L. R. A. 795; *State ex rel. Board of Education of Oshkosh v. Haben*, 22 Wis. 629; *Board of Com'rs of Jackson County v. State ex rel. Shields*, 155 Ind. 604, 58 N. E. 1037; *Farris v. Vannier*, 6 Dak. 186, 42 N. W. 31; *Hubbard v. Fitzsimmons*, 57 Ohio St. 436, 49 N. E. 477; *High School District No. 137 v. County of Lancaster*, 60 Neb. 147, 82 N. W. 380, 49 L. R. A. 343. For construction of an identical constitutional provision, see *McCabe v. Carpenter*, 102 Cal. 469, 36 Pac. 836.

*The Attorney General* and *Augustus Brawley*, for respondents, among other things, contended that the state aid road law is constitutional. *United New Jersey R. & Canal Co. v. Gummere*, 69 N. J. L. 111, 54 Atl. 520; *Highate v. State*, 59 Vt. 39, 7 Atl. 898; *Farris v. Vannier*, 6 Dak. 186, 42 N. W. 31; *Simon v. Northup*, 27 Ore. 487, 40 Pac. 560, 30 L. R. A. 171; *Johnson v. San Diego*, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178; *Daggett v. Colgan*, 92 Cal. 53, 28 Pac. 51, 27 Am. St. 95, 14 L. R. A. 474; *State v. Harris*, 47 Wis. 298, 2 N. W. 543; *State ex rel. Bulkeley v. Williams*, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; *Township of East Union v. Comrey*, 100 Pa. St. 362; *Township of Mahanoy v. Comry*, 103 Pa. St. 362; *Porter Township*

*Road*, 1 Walker (Pa. Sup. Ct. Cas.) 10; *Middletown Road*, 15 Pa. Sup'r Ct. 167.

MORRIS, J.—The only question presented by this appeal is the constitutionality of the state aid road law, found in Laws of 1907, p. 298; Rem. & Bal. Code, § 5880 *et seq.* The act provides that the county commissioners of any county, upon presentation of a petition signed by the owners of two-thirds of the lineal feet fronting on any public highway, must pass a resolution that public interest demands the improvement of such public highway within such county. Such resolution shall be transmitted to the state highway board, who shall investigate and determine whether such highway is of great public utility and general convenience and, if so, they shall approve such resolution. The state highway commissioner shall thereupon prepare plans for the contemplated improvement, and submit them to the county commissioners, and if adopted, such improvement will be then undertaken under the direction of the state highway commissioner. The cost of the improvement shall be paid in the following manner: One-half out of the state highway fund, thirty-five per centum from the general road and bridge fund of the county, and the remaining fifteen per centum out of the district road fund of the district in which the improvement is located. The question was submitted to the trial court on the application for an injunction to enjoin the execution of a contract about to be executed by the state highway commissioner. To this complaint a demurrer was sustained, and, upon entry of judgment, plaintiff appeals.

The attack upon the law is made upon the theory that it violates the constitutional provision providing for local self-government, destroys uniformity of taxation, and diverts the proceeds of a tax. We do not so read the law. There will be no dissent from the assertion that it is not within the power of the legislature to take away from the several counties of this state the right of local self-government

as vested in them as legal subdivisions of the state. But the fact that a state board, acting upon the initiative and at the request of county commissioners, directs, under the immediate supervision of another state office, the improvement of a road within a county, upon plans approved and adopted by the county commissioners, does not take from the commissioners any right or power which, under any provision of the constitution, is vested in them. Our constitution is a limitation of power, and such rights and powers of local government as are not conferred upon counties by the language of the constitution remain with the state and may be exercised by the legislature as the law-making power of the state. Rules and regulations for local county government and control, except as otherwise provided for in the constitution, are as much within the control of the state as those matters which are more general and statewide. The citizens of the state require roads to pass from one portion of the state to another, such requirement being a general, beneficial use. It is the duty of the state to construct and maintain such roads, and if, as it needs must, such road passes through a county, the fact that the state exercises supervision of its improvement is not in violation of any provision of local self-government contained in our constitution. Neither is it destructive of the provision for uniformity of taxation.

It has been held, as suggested by appellant, that laws requiring the collection of taxes by a county, to be turned over to state officials to be expended for a purely state purpose, violate this constitutional requirement. But we have no such provision before us. County money is not raised and paid to the state for a purely state purpose. The road is a benefit to the state, to the county, and to the local district. The state raises money in the several counties to expend in the maintenance of those things which are of general benefit to all its citizens. The county reaps a special benefit as distinguished from this general benefit, and the district a still greater and special benefit, and for such benefit each is prop-

erly taxed. The money raised by the state being expended for a state benefit, the money raised by the county being expended for a county benefit, and the money raised by the district being expended for a district benefit, there is no violation of the uniformity of taxation rule. Nor is there any diversion of the proceeds of a tax, for the funds so raised by the state, the county, and the district are respectively expended within their own territory and for the purposes for which they were raised. *State v. Board of Com'rs of Shawnee County*, 28 Kan. 481.

Many of the states have similar laws, but so far as we can discover no state has held such law unconstitutional for any reason. The New Jersey law, Gen. Stat. p. 2902, which differs from ours somewhat in the detail of laying out the road, and provides for the payment of one-third of the cost by the state and the remainder by the county, was before the supreme court of that state in the case of *United New Jersey R. & Canal Co. v. Gummere*, 69 N. J. L. 111, 54 Atl. 520, upon a certiorari to review an assessment. The assessment was sustained. The court, referring to the cases relied upon by the prosecutor to invalidate the assessment, says:

"Their purport is that where a statute under which the assessment is levied is unconstitutional, . . . or where the tribunal confirming the assessment is without jurisdiction of the matter, for example, if it has failed to give the required notice, . . . or where the circumstances are such that no assessment can constitutionally be made, . . . then the statutory limitation will not bar. None of these grounds, nor any akin to them, appears in the present case. The statute provides for a constitutional assessment."

Such language would seem to indicate that there was no doubt of the constitutionality of the law in the mind of the court, nor was such doubt suggested by the prosecutors.

Believing the law to be constitutional, the judgment is affirmed.

Rudkin, C. J., Fullerton, and Gose, JJ., concur.

CHADWICK, J. (dissenting)—The act does take away the right of local self-government in this, that there is no provision of the law warranting the expenditure of county funds by any other than the board of county commissioners. The fact that the board invites the improvement does not meet the full intendment of the law. It is the intent and purpose of the constitution as well as the statute, Rem. & Bal. Code, § 3890, subd. 5, "to allow all accounts legally chargeable against such county not otherwise provided for, and to audit the accounts of all officers having the care, management, collection, or disbursement of any money belonging to the county or appropriated to its benefit"; that county funds shall be expended only for strictly county purposes and upon proper vouchers, audited by the board of county commissioners. Under the present law, funds collected by the county for special uses are put at the unrestrained disposal of a board in no way responsible to the local taxpayer. In the case of *Davies v. Board of Supervisors of Saginaw County*, 89 Mich. 295, 50 N. W. 862, the general principle was laid down that any law which undertakes to destroy the function of the local governing board is unconstitutional. Speaking of a similar law, the court said:

"It seeks to divest certain local officers, recognized as such and provided for by the constitution, of the function of their offices, and to confer those functions upon a board, appointed by a power removed from that locality, and not responsible to local authority. The functions of township officers who are continued by constitutional enactment are as clearly within the contemplation and protection of the constitution as are the officers themselves, and the legislature has no more power to deprive those officers of their authority, and confer that authority upon officers not of local selection, than it has to abolish the offices. It is just as essential to local self-government that the functions of elective officers be preserved to such officers, as that the right of election be protected; indeed, it is the local management of local concerns, by and through the medium of officers of their own selection, that is sought to be protected. Strip the officers of a munici-

pality of their functions, and you rob the municipality of its vitality."

See, also, Cooley, Const. Lim. (4th ed.), ch. 8.

It will not be contended that the state could levy a direct tax upon a particular county for the purpose of aiding state roads. Therefore any law that provides for the diversion of a fund collected by the county, to the disbursing officers of the state, annuls not only the provisions of the law defining the duties of county commissioners, but evades section 12 of article 11 of the constitution. It does indirectly that which could not be done directly and should be held to be void.

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[No. 8452. Department Two. March 21, 1910.]

THE STATE OF WASHINGTON, *Respondent*, v. S. HAGIMORI, *Appellant*.[1]

MUNICIPAL CORPORATIONS — POWERS — PENAL ORDINANCES — CONFLICT WITH STATE LAWS. An ordinance providing a punishment for leasing a gambling house by fine not exceeding $300, or imprisonment not exceeding three months, is within the powers of a city of the third class, notwithstanding a state law on the same subject (Rem. & Bal. Code, § 2925) authorizing a fine for substantially the same act in a sum not exceeding $100, in view of Rem. & Bal. Code, § 7685, authorizing the city to pass ordinances not in conflict with the laws of the state and to impose fines and penalties for the violation of ordinances not exceeding $300, or three months imprisonment.

CRIMINAL LAW—JUSTICE OF THE PEACE—JURISDICTION—ORDINANCE—VIOLATION—STATUTES—AMENDMENT. Under Laws of 1901, p. 34, ch. 35 (which amended Bal. Code, § 4683), providing that the jurisdiction of justices of the peace over misdemeanors shall be concurrent with the superior courts except that the fine shall in no event exceed $100, and adding at the end of the section that justices shall have jurisdiction over all criminal cases coming under any city ordinance, a justice of the peace is not limited to a fine of $100 in cases coming under city ordinances, especially in view of the fact that the act of 1901 simply amended Bal. Code, § 4683 by omitting therefrom an express limitation to that effect.

[1]Reported in 107 Pac. 855.

SAME—TRENCHING UPON SUPERIOR COURT — CONSTITUTIONAL LAW. An act conferring upon justices of the peace jurisdiction to impose a fine not exceeding $300 for violation of a city ordinance against the lessor of a gambling house, when the state law on the same subject limited the superior courts to a fine of $100, does not trench upon the jurisdiction of the superior courts, in violation of Const., art. 4, § 10, in view of Const., art. 4, § 6, conferring jurisdiction upon justices in all cases of misdemeanors not otherwise provided by law.

CRIMINAL LAW — APPEALS — JURISDICTION — TRIAL DE NOVO—NEW SENTENCE. Upon appeal from a municipal court in a prosecution for the violation of a city ordinance, there is a trial *de novo* and judgment on the last conviction, authorizing the superior court to enter a greater fine than that imposed by the lower court.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered July 31, 1909, upon a trial and conviction of leasing a gambling house. Affirmed.

*Peters & Carr*, for appellant.
*John A. Best, Jr.*, for respondent.

PARKER, J.—This is a prosecution by the city of Bremerton for a violation of one of its ordinances. Ordinance No. 43, provides:

"Any . . . lessor of any gambling house, or any place where gambling is carried on or permitted . . . shall be fined in any sum not exceeding three hundred dollars, nor less than ten dollars, or imprisoned in the town jail not exceeding three months, or both said fine and imprisonment. . ."

The defendant was charged with the violation of this ordinance, and upon conviction before the police justice of the city, was fined $100, from which he appealed to the superior court for Kitsap county. Upon a trial *de novo* in the superior court, he was again convicted and fined $150, from which he has appealed to this court.

As we understand the several contentions of learned counsel for appellant, they may be reduced to the following: (1) That the ordinance is void; (2) that the police justice was without jurisdiction; and (3) that the superior court in no

event had jurisdiction to fine appellant a greater sum than he was fined by the police justice.

It is argued that the ordinance is void because it provides for the punishing of the doing of acts which are punishable under the general law of the state. We are cited to § 2925 of Rem. & Bal. Code where substantially the same acts are made punishable by a fine not exceeding $100. The power of cities of the third class, to which class Bremerton belongs, to enact ordinances of this nature is found in Rem. & Bal. Code as follows:

"Sec. 7685. The city council of such city shall have power,

"(1) To pass ordinances not in conflict with the constitution and laws of this state or of the United States; . . .

"(16) To impose fines, penalties and forfeitures for any and all violations of ordinances, and for any breach or violation of any ordinance to fix the penalty by fine or imprisonment, or both, but no such fine shall exceed three hundred dollars nor the term of such imprisonment exceed the term of three months; . . .

"(21) To make all such ordinances, by-laws, rules, regulations and resolutions, not inconsistent with the constitution and laws of the state of Washington, as may be deemed expedient to maintain the peace, good government and welfare of the corporation and its trade, commerce and manufactures, and to do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter, and to exact and enforce within the limits of such city all other local, police, sanitary and other regulations as do not conflict with general laws."

We think by this grant of power under our former decisions the city was authorized to enact this ordinance, notwithstanding it made punishable certain acts which are also punishable under the general law of the state, and that the city was not required to make the punishment within the limit of that prescribed by the general law. It could fix the punishment at any amount of fine or term of imprisonment within the limits prescribed by subd. 16 above quoted. *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 324; *Seattle v. MacDonald*,

47 Wash. 298, 91 Pac. 952, 17 L. R. A. (N. S.) 49. The only contention here made is that the subject-matter of this ordinance was outside of the ordinance-making power of the city, because of the state law upon the subject, not that it would be outside the police power of the city under the general grant of power above quoted, in the absence of the state law making such acts punishable.

It is further contended that the police justice had no jurisdiction to entertain a prosecution under this ordinance, because the extreme punishment therein prescribed was beyond his jurisdiction. The argument proceeds upon the theory that the jurisdiction of a police justice and the jurisdiction of a justice of the peace were, at the time of the prosecution, concurrent and equal, so far as prosecutions under city ordinances were concerned. We refer to the jurisdiction of justices of the peace as it existed at that time, because since then by Laws 1909, p. 377, § 1 (Rem. & Bal. Code, § 46), the jurisdiction of justices of the peace has been changed. The jurisdiction of police justices, which is defined by Rem. & Bal. Code, § 7700, and the jurisdiction of justices of the peace existing at the time of this prosecution, was defined by Bal. Code, § 4683, as amended by Laws of 1901, p. 34, ch. 35. These provisions lend support to the view that the extent of the jurisdiction of police justices and justices of the peace was the same as to prosecutions under city ordinances. We will therefore assume, without deciding, that to be the case, and that Laws 1901, p. 34, ch. 35, controlled the extent of that jurisdiction. It is there provided:

"That section 4683 of Ballinger's Annotated Statutes and Codes of Washington, relating to the criminal jurisdiction of justices of the peace, be and is hereby amended to read as follows: Section 4683. The jurisdiction of justices of the peace in criminal prosecutions shall be co-extensive with their respective counties, and they shall have concurrent jurisdiction with the superior courts in all misdemeanors, but in no event shall they impose a fine to exceed one hundred dollars, or sentence a person to jail for a period longer than thirty-

three days, and where the offense is one that is punishable by both a fine and imprisonment, the period of imprisonment at the rate of three dollars per day for each day of the sentence and the fine, shall not together exceed one hundred dollars but if any fine imposed is not paid with costs, then the person shall be imprisoned until such fine and costs are paid at the rate of three dollars per day for each day confined and the justices of the peace shall have jurisdiction over all criminal cases coming under any city or town ordinance."

It is argued that this amendment limits the power of justices of the peace to punishment by fine not exceeding $100, or imprisonment not exceeding thirty-three days in cases of this kind. This argument is somewhat plausible, when we look only to the provisions of that amendment; but by referring to § 4683 which is thereby amended we find that its concluding words conferred jurisdiction upon justices of the peace, "Over all criminal cases coming under any city or town ordinance, and on conviction shall have power to fine the person so offending in any sum not exceeding $100." It will be noticed this limitation upon the extent of the fine and imprisonment in connection with ordinance cases is omitted from the amendment. This circumstance, together with the fact that cities of this class were clearly given power to provide for a greater punishment, and the fact that the law contemplated the prosecution of all violations of city ordinances either before a police justice or a justice of the peace, leads us to conclude that the limitations found in the part of the amendment of 1901, preceding the giving of justices jurisdiction over cases coming under city ordinances without qualification, does not apply to their jurisdiction in such city ordinance cases.

It is suggested that this construction has the effect of rendering the jurisdiction of justices of the peace more extended than contemplated by the constitution, and makes that jurisdiction trench upon the jurisdiction of superior courts, it being provided by § 10, art. 4, of the constitution that such jurisdiction, "shall not trench upon the jurisdiction of superior or other courts of record." We do not think this

trenches upon jurisdiction of superior courts, since this offense in no event is more than a misdemeanor, and superior courts are not given exclusive jurisdiction in cases of misdemeanor. Section 6, art. 4, of the constitution provides that they shall have jurisdiction, "in all cases of misdemeanor not otherwise provided for by law." Thus clearly contemplating that misdemeanors might be placed within the jurisdiction of justices of the peace or other courts. We are of the opinion that the police justice was not without jurisdiction even conceding his jurisdiction could not have been greater than that of a justice of the peace.

It was finally contended that the superior court did not have power to fine the defendant a greater sum than he was fined by the police justice. We think, in view of the fact that our law clearly contemplates a trial *de novo* in the superior court upon an appeal taken from a conviction before a police justice or justice of the peace, this contention is not well founded. Upon such a trial in the superior court, that court proceeds with the case as though it were commenced there. The question is not one of errors committed in the justice court, but there is involved only the question of the defendant's guilt or innocence, and if convicted the superior court renders judgment upon that conviction, not upon the conviction had in the justice court.

We conclude that the judgment should be affirmed. It is so ordered.

MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8539. *En Banc.* March 24, 1910.]

## H. M. Frost *et al.*, *Respondents*, v. Puget Sound Realty Associates, *Appellant*, Parke Weed Willis *et al.*, *Interveners and Appellants.*[1]

Corporations — Receivers—Appointment—Grounds—Acts Ultra Vires. The fact that a realty and investment company is acting *ultra vires* in violation of the trust company act is not ground for the appointment of a receiver at the suit of subscribers, since only the state can question the acts of the company on that ground.

Same—Evidence—Sufficiency. It is error to appoint a temporary receiver of a realty and investment company, at the suit of a few subscribers, where the evidence shows solvency, careful and capable business management and no probable loss to subscribers that can be avoided by a receivership.

Same—Remedy at Law. The wrongful payment of commissions by a realty and investment company to one of its trustees is not ground for the appointment of a receiver, where the subscriber has a remedy at law without the aid of a receivership.

Appeal from an order of the superior court for King county, Gay, J., entered September 13, 1909, appointing receivers pending a suit for the dissolution of a corporation, after a hearing before the court. Reversed.

*Shank & Smith* and *Hughes, McMicken, Dovell & Ramsey*, for appellant.

*Shepard & Flett*, for respondents.

*Harold Preston*, for interveners.

Crow, J.—Three separate actions, afterwards consolidated, were commenced by H. M. Frost and other investors, in the superior court of King county, to secure the appointment of a receiver for, and the dissolution of, the defendant corporation, Puget Sound Realty Associates. Parke Weed Willis and two hundred and forty-one other investors, by complaint in intervention, joined the corporation in resist-

[1]Reported in 107 Pac. 1029.

ing the receivership. After issue joined, an order was entered appointing receivers *pendente lite*. From that order, which has been superseded, this appeal is prosecuted by the defendant corporation and the interveners, hereinafter designated as appellants and interveners.

The appellant Puget Sound Realty Associates is a corporation organized under the laws of this state, with $100,000 capital stock, all of which has been subscribed, and about $50,000 of which has been paid. The principal purpose of the corporation seems to have been to buy, sell, improve, rent, and generally deal in valuable real estate, primarily for the benefit of its investors or bondholders hereinafter mentioned, and thereafter for the joint benefit of the investors and itself. To obtain additional funds with which to carry out this enterprise, it issued income profit sharing bonds to its investors upon full payment; and also solicited subscription contracts for other like bonds payable in installments, the bonds to be delivered when the payments were completed. There were three series of bonds, which differed in some particulars not necessary to be now mentioned. The bonds of series 2 and 3 read as follows:

"No.—— Income Bond, Profit Sharing. $——

"This is to certify that ———— is the owner of this Income Bond, Profit Sharing, for ——— Dollars, issued by the Puget Sound Realty Associates, hereinafter called the Company.

"The Investment Fund of the Company is the net proceeds of all outstanding Bonds plus the net amount received on Contracts therefor and shall be invested in real estate and real estate securities in the State of Washington under the direction of the Board of Trustees of the Company.

"The net profits derived from the Investment Fund shall be divided in the following manner:

"First. Five per cent per annum on the face value of Bonds, and on the amount paid in on Contracts therefor, to the holders thereof, as a preferred dividend.

"Second. One-fifth of the net profits in excess of the said

five per cent per annum to a surplus fund, one-half to belong to the holders of Bonds, and the other one-half to the Company.

"Third. One-half of the balance to the holders of Bonds as a special dividend and the other one-half to the Company.

"Fourth. One-half of the net profits from the invested surplus fund to the holders of Bonds as a further special dividend and the other one-half to the Company.

"Those holding Contracts for Bonds shall participate only in the preferred dividend. All dividends to be paid semi-annually on the first days of April and October of each year.

"The words 'net profits' as used herein shall be construed to mean the net profit realized from property in which the Investment Fund has been invested, including the rentals and the net profit realized whenever a sale is made.

"In calculating the net income and profits, only charges incident to the ownership and management of the properties in which the Investment Fund is invested shall be deducted from the gross income and profits. Salaries of Officers and other office expenses of the Company shall not be deducted.

"This Bond is one of a Series designated as Series II, limited to $500,000.

"This Bond may be transferred by indorsement and record thereof on the books of the Company and proper acknowledgment hereon.

"The coupons attached hereto are for convenient receipting of dividends.

"Upon the final dissolution of the Company the Investment Fund and one-half of the Surplus Fund shall be returned to the bondholders out of the proceeds of the sale of properties in which said funds are invested.

"The books and records of the Investment Fund shall always be open to inspection by the holders of these Bonds.

"In Witness Whereof the Puget Sound Realty Associates has caused these presents to be signed by its President, or Vice President, and its corporate seal to be hereunto affixed and attested by its Secretary or Assistant Secretary, at Seattle, Washington, this —— day of ———, 19——. Puget Sound Realty Associates,

[Seal] By————————, President.

"Attest: ————————, Secretary."

To each bond coupons were attached reading as follows:

"Bond No.— Coupon No.—
"Amount of Bond $— Due ———, 19—.
"Puget Sound Realty Associates
"will make full payment to the owner and holder of this coupon out of the net profits mentioned in the bond to which this coupon is attached, at the office of the company in Seattle, Washington, the sum due for the income period in which this coupon is redeemable according to the terms named in the bond of which this coupon is a part.
"————————, President.
"————————, Secretary."

The appellant secured subscribers for about $1,500,000 face value of these bonds, on which about $928,000 was collected. Of this sum it invested about $740,000 in real estate in the business districts of Seattle and Tacoma, much of which has since appreciated in value. Most of these properties were improved and produced rentals. All were subject to mortgage liens. Two were unimproved, but it was the intention of the appellant to erect business blocks thereon, and to satisfy the mortgages out of installments yet to mature on contracts for bonds subscribed. These installments were being regularly paid in large amounts during each month, until the fall of 1907. In addition to interest charges and general taxes, liabilities were incurred for heavy special improvement assessments, which latter, however, had been substantially discharged at the time of the commencement of this action. Some dividends had been made to the holders of the bonds, principally on those of series 1. In the fall of 1907 a financial panic occurred which caused many holders of installment contracts to default. Under these conditions appellant continued to handle the properties as well as it could, but was unable to declare any dividends or immediately discharge the mortgage liens. Some fifty investors, representing about $15,000 in bonds, being dissatisfied, commenced these consolidated actions to dissolve the corporation and secure the appointment of a receiver. Thereupon two hundred and

forty-two investors, representing over $200,000 in bonds, intervened for the purpose of resisting the receivership.

The trial court made findings which we cannot approve, as we conclude they are not sustained by the weight of the evidence. A detailed statement of the findings made or the evidence introduced would unnecessarily lengthen this opinion. The evidence, however, shows that, of the $928,000 collected from investors as payments on the $1,500,000 of bonds subscribed, about $188,000 was paid out as commissions to agents for securing the $1,500,000 of bond subscriptions, that a considerable portion thereof was primarily paid to one Duryea, one of the appellant's trustees, who had charge of all the soliciting agents, some three hundred or more in number; and that Duryea settled all traveling and other expenses incurred by himself and the solicitors. There is no evidence that any part of this sum was paid directly or indirectly to the appellant, or to any of its other trustees. The respondents contend that the payment of these commissions from the proceeds of the bonds was a misappropriation of funds; that the commissions were excessive, and that appellant had represented to its investors that no such payments would be made from the investment fund. There is no evidence that the amount of commissions paid was excessive for the services rendered, or that any such representations were made, other than to some two or three of the respondents whose evidence on that point is disputed, not only by other witnesses, but also by the surrounding circumstances. The interveners insist that the funds paid into the corporation by the investors had been properly handled and well invested; that the management of the properties acquired has been satisfactory to the interveners, and the investors generally; that the investments have been profitable; that greater profits will be yet realized out of them; that the deductions from funds paid as commissions in satisfaction of the cost of securing the funds was to be anticipated by the investors, and was expressly provided for in the bonds and

contracts; that the affairs of the investors have been honestly and economically administered by the corporation, and that the appointment of a receiver will be destructive of the enterprise and most prejudicial to the interests of all concerned. The appellant corporation contends that the following clause in the bond contemplated the payment of commissions:

"The Investment Fund of the Company is the *net* proceeds of all outstanding Bonds plus the net amount received on Contracts therefor and shall be invested in real estate and real estate securities in the State of Washington under the direction of the Board of Trustees of the Company."

The books containing appellant's accounts with the individual bondholders, which were at all times open to their inspection, plainly disclose these payments of commissions. While it is perhaps a fact that the payments were not publicly proclaimed, there is no evidence that they were at any time disputed or concealed. Moreover, they have been ratified by the interveners who hold more than $200,000 of the bonds, and no complaint appears as yet to have been made by any of the many other investors who have not appeared in this action. Assuming, without deciding, that some three or four of the respondents were misled or deceived in the matter of the commissions taken from their personal subscriptions, that fact would not necessitate the appointment of a receiver.

The main contentions of the respondents are, that the contracts between them and the appellant created a trust for which appellant is trustee, and of which they are beneficiaries; that the appellant is conducting a trust business in violation of chapter 176, Laws of 1903, page 367 (Rem. & Bal. Code, § 3346 *et seq.*), commonly known as the trust company act, under which it is not organized, and that its acts are *ultra vires*. Assuming, without deciding, that a trust has been created of which appellant is trustee, that it is violating the trust company act, and that its contracts are *ultra vires*, still the appointment of a receiver would not be authorized in this action. Not only have the respondents

subscribed for the bonds, but some twenty-seven hundred others have likewise subscribed, and have also invested their money in the common venture. They and the appellant corporation have thereby acquired valuable rights, and under such circumstances it would seem that the participating respondents should now be estopped from questioning the validity of their contractual relations with the appellant and the other investors. Whether or not the appellant is attempting to perform corporate acts in violation of the trust company act and without authority of law can only be questioned by the state in a proper proceeding instituted for that purpose.

The vital questions before us therefore are, whether the appellant is insolvent, whether the respondents are in imminent danger of sustaining losses which could be obviated through a receivership, and whether appellant has fraudulently or wilfully mismanaged its business affairs. The voluminous evidence, carefully considered, shows solvency, careful and capable business management under existing conditions, and no probable loss to respondents which can be avoided by a receivership. Only a small number of the investors ask or desire a receivership. The evidence indicates that the dissatisfaction of some of the investors has been engendered and intensified by the pernicious activity and animosity of a discharged employee who, since the panic of 1907, without apparent excuse, has endeavored to destroy their confidence in appellant, a proceeding that should receive no encouragement from a court of equity. On the other hand, the interveners, who represent over $200,000 par value of these bonds, earnestly desire that the appellant may continue in charge, insisting that less expense will be thereby incurred, and that the investors' interests will be thus best subserved. This fact, while not controlling, should be taken into consideration in connection with other questions discussed, in passing upon the application for a receiver. All other investors have remained inactive, or have at least re-

trenches upon jurisdiction of superior courts, since this offense in no event is more than a misdemeanor, and superior courts are not given exclusive jurisdiction in cases of misdemeanor. Section 6, art. 4, of the constitution provides that they shall have jurisdiction, "in all cases of misdemeanor not otherwise provided for by law." Thus clearly contemplating that misdemeanors might be placed within the jurisdiction of justices of the peace or other courts. We are of the opinion that the police justice was not without jurisdiction even conceding his jurisdiction could not have been greater than that of a justice of the peace.

It was finally contended that the superior court did not have power to fine the defendant a greater sum than he was fined by the police justice. We think, in view of the fact that our law clearly contemplates a trial *de novo* in the superior court upon an appeal taken from a conviction before a police justice or justice of the peace, this contention is not well founded. Upon such a trial in the superior court, that court proceeds with the case as though it were commenced there. The question is not one of errors committed in the justice court, but there is involved only the question of the defendant's guilt or innocence, and if convicted the superior court renders judgment upon that conviction, not upon the conviction had in the justice court.

We conclude that the judgment should be affirmed. It is so ordered.

MOUNT, CROW, and DUNBAR, JJ., concur.

[No. 8539. *En Banc.* March 24, 1910.]

# H. M. Frost *et al.*, *Respondents*, v. Puget Sound Realty Associates, *Appellant*, Parke Weed Willis *et al.*, *Interveners and Appellants.*[1]

Corporations — Receivers—Appointment—Grounds—Acts Ultra Vires. The fact that a realty and investment company is acting *ultra vires* in violation of the trust company act is not ground for the appointment of a receiver at the suit of subscribers, since only the state can question the acts of the company on that ground.

Same—Evidence—Sufficiency. It is error to appoint a temporary receiver of a realty and investment company, at the suit of a few subscribers, where the evidence shows solvency, careful and capable business management and no probable loss to subscribers that can be avoided by a receivership.

Same—Remedy at Law. The wrongful payment of commissions by a realty and investment company to one of its trustees is not ground for the appointment of a receiver, where the subscriber has a remedy at law without the aid of a receivership.

Appeal from an order of the superior court for King county, Gay, J., entered September 13, 1909, appointing receivers pending a suit for the dissolution of a corporation, after a hearing before the court. Reversed.

*Shank & Smith* and *Hughes, McMicken, Dovell & Ramsey*, for appellant.

*Shepard & Flett*, for respondents.

*Harold Preston*, for interveners.

Crow, J.—Three separate actions, afterwards consolidated, were commenced by H. M. Frost and other investors, in the superior court of King county, to secure the appointment of a receiver for, and the dissolution of, the defendant corporation, Puget Sound Realty Associates. Parke Weed Willis and two hundred and forty-one other investors, by complaint in intervention, joined the corporation in resist-

[1]Reported in 107 Pac. 1029.

filed findings of fact and conclusions of law in favor of the plaintiffs, and entered a final judgment thereon. The defendant thereupon moved for a vacation of the judgment and a new trial. This motion was denied on April 22, 1909, and the defendant has appealed.

The respondents have moved to dismiss, for the reason that no sufficient notice of appeal has been given or served. It is conceded that the notice upon which the appellant relies was an oral one given in open court on April 22, at the time of the denial of her last motion for a new trial and a vacation of the judgment. No oral notice was given on March 1, 1909, at the time the final judgment was entered. Nor has any written notice been given. The statute, Rem. & Bal. Code, § 1719, provides that:

"A party desiring to appeal to the supreme court under the provisions of this title may, by himself or his attorney, give notice in open court or before the judge, if the judgment or order appealed from is rendered or made at chambers, at the time when such judgment or order is rendered or made, that he appeals from such judgment or order to the supreme court, and thereupon the court or judge shall direct the clerk to make an entry of such notice in the journal of the court. . . ."

The oral notice should have been given on March 1, 1909, when the final judgment was entered, and it is evident that an oral notice given on April 22, 1909, is insufficient. Appellant, however, contends that she has appealed from the order to vacate the judgment; that she gave oral notice when that order was rendered and made. The journal entry of the oral notice fails to state the particular order from which the appeal was taken. In her appeal bond the appellant recites that it was from the judgment entered on March 1, 1909, and this seems to have been her intention. If the appeal is from the order of April 22, 1909, refusing to vacate the judgment and grant a new trial, appellant can have no standing in this court, as under the rule announced in *Sound Investment Co. v. Fairhaven Land Co.*, 45 Wash. 262, 88 Pac. 198,

it is not an appealable order. The appeal cannot be sustained, whether taken from the final judgment of March 1, 1909, or from the order refusing to vacate the judgment entered on April 22, 1909. As to the former, no sufficient notice was given, while the latter order is not appealable.

The appeal is dismissed.

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[No. 8549. Department One. March 24, 1910.]

ERNEST L. BICKFORD, *Respondent*, v. BELL BICKFORD, *Appellant*.[1]

DIVORCE — GROUNDS — INCOMPATIBILITY — EVIDENCE — SUFFICIENCY. Rem. & Bal. Code, § 982, authorizing a divorce for certain causes and "any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together," does not authorize a divorce merely because the parties cannot live together; and it is error to grant a divorce to a husband upon evidence of incompatibility, quarrels and irritation for which he was as much to blame as his wife, and no other sufficient cause appears.

Appeal from a judgment of the superior court for King county, Geo. H. King, Esq., judge *pro tempore*, entered November 12, 1909, upon findings in favor of the plaintiff, in an action for a divorce, after a trial on the merits. Reversed.

*Kerr & McCord*, for appellant.

*Peters & Powell*, for respondent.

PER CURIAM.—This is an appeal from a judgment of the superior court of King county, granting the respondent a divorce from the appellant. In his complaint the respondent charged the appellant with personal indignities rendering his life burdensome. He alleged that he was a physician and surgeon, engaged in the general practice of his profession; that his wife was of a jealous nature, having a nervous tem-

[1]Reported in 107 Pac. 837.

perament and a violent temper, and was not content with letting him practice his profession with the secrecy it required, but would insist on knowing who he was treating at particular places, whether they were male or female patients, the disease the patient was afflicted with, the kind of medicine he was administering, how long he stayed at the residence of his respective patients, and many other matters which due regard for the ethics of his profession and justice to his patients required him to keep to himself; that his refusal to answer many such questions would cause his wife to become violently angry, and the result was a constant quarrel between himself and his wife, all of which rendered him nervous and sick, thus aggravating and making worse an incurable disease with which he was suffering, leaving him unfit to follow his profession; that this conduct on the part of the wife had continued for more than seven years last past, and during the time he lived at his home, was practically of daily occurrence; that it would at times become so unbearable as to compel him to leave his home and take up his residence elsewhere in the city of Seattle in order that he might recover from nervousness and illness caused thereby; and that he was living separate and apart from his wife at the time of filing his complaint.

In her answer to the complaint the appellant denied generally all the allegations of misconduct on her part, and pleaded affirmatively that she had always demeaned herself as a dutiful and obedient wife.

The evidence of neither of the parties given at the trial quite sustained the allegations of their respective pleadings. The respondent did testify to constant bickerings and quarrels between himself and his wife, and to matters tending to support his complaint in other respects. But in giving particulars he leaves a strong inference that some of the inquiries of the wife did not arise so much from jealousy or so much from a desire to know who his patients were and the several diseases as it did to know how the family was getting

along financially, and that it was these inquiries more than the others that so annoyed the respondent. He makes it clear, also, we think, that the quarreling and bickering were not at all times the fault of the wife. His illness became more aggravated as the pressure of his work increased, and this tended to make him cross and irritable, so much so that he would lose his temper with his children when assisting them with their lessons, and it is made clear that at times he did not bear with much patience even the simplest inquiries on the part of his wife. He testified to leaving his home on two different occasions because of quarrels with his wife, and of returning at her request and solicitations under the promise that she would let him take care of his business in his own way; also, that he had left the third and last time some two and a half years before the trial with the belief that it was impossible for him to live at home. He said, also, that he had no intention of returning, no matter what the result of his suit was, as he would never thereafter live with his wife.

The appellant in her testimony also supported in the main the allegations of her answer. She denies absolutely that she even quarreled with her husband. She testified that he would often become irritable and quarrelsome, when he would use towards her much profane language, but that she did not answer him back, but would often cry because of his treatment of her. She denies ever having inquired into matters relating to his practice, or that she ever desired to know who he was treating or the sex of his patients, or the diseases with which they were suffering. She testified, also, that she did not know why her husband quit his home and took up his residence elsewhere. She admits soliciting him to return and promising him to do better, yet she says that when making the promise she did not know in what way she had offended. In fact, she denies in detail all the allegations of wrongdoing the husband makes against her. There is, however, in the record some things that indicate that she

was not as frank as she would have us believe. For example, there is a copy of a letter in the record from herself to her husband, evidently written with the idea that it might sometime see the light of the world, in which she upbraids him for his shortcomings and makes a detailed recital of her supposed wrongs in a way that plainly shows she was not unfamiliar with the part, and we doubt not that the respondent had heard the same thing many times from her lips; and a witness, also, whose truthfulness is not to be questioned, recites a conversation with the appellant which shows that she did know the reasons given by the respondent for leaving home.

But the record does something more than this. It makes it plain that the appellant might have admitted all that she has seemingly improperly denied, and still not have forfeited her title to respect as a dutiful and faithful wife. Her's has been the heroic part. The parties have two children, a daughter aged fifteen years, and a son aged thirteen. The daughter has been epileptic since her infancy, and requires the almost constant care of some one. The mother, since the birth of her son, has been afflicted with articular rheumatism, which at all times causes her more or less pain and sometimes renders her almost helpless. Yet, notwithstanding her infirmity, she has cared for her daughter, kept lodgers to help out the family income, performed her household duties, all for the greater part of the time without domestic help. It would seem that if at times her burdens caused her to cry out for relief, common justice would forbid laying a penalty upon her for so doing.

The respondent's conduct appears base and mean, when compared with that of the appellant. Doubtless his infirmity furnished him a measure of excuse, but it would hardly seem to justify his conduct in its entirety. By his own story, he is ill-tempered and profane, and the record convicts him of selfishness in the extreme. If a sacrifice was required to be made, it seemed to fall upon the wife, while the periods of recreation always fell to his share. Indeed, the only time he

seems to have found during all their married life when the wife could leave her home for a rest and change was since he left her the last time. He persuaded her to take a short trip north on an Alaskan steamer. No sooner had she gone, however, than he entered the house which he had not been in for a year or more, and stripped it of its library and, as his wife says, practically all of the valuable furniture, curios and bric-a-brac they possessed. He, of course, belittles the transaction, saying the articles taken were few in number and of no considerable value, but a list of them is in the record, and it supports the wife's story rather than his own. Her counsel contend that his sole purpose in persuading her to take the trip was to give him an opportunity to take those articles, and we are afraid the contention is well founded. If it be so, it exhibits a littleness we are seldom called upon to record.

The lower court granted the respondent a divorce on the ground that it was satisfied that the parties could no longer live together; but this is not a sufficient cause for divorce, under the statute. It is true that the statute, after enumerating certain causes for which divorces may be granted, provides: "And a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together." [Rem. & Bal. Code, § 982.] But this does not authorize a divorce without some distinct cause found by the court which it shall deem sufficient. It is not enough that the record may convince the court that the parties can no longer live together. Some cause for that condition must be found, and the cause must not be brought about by the misconduct of the party seeking the divorce. As we said in *Wheeler v. Wheeler*, 38 Wash. 491, 80 Pac. 762:

"The trial judge evidently labored under an impression that he was authorized to grant a divorce upon the finding that the parties can no longer live together. But there is no such provision in the statute. Bal. Code, § 5716, provides, that the court may grant divorces for certain causes therein

named, and, in subdivision 7 of that section, are these words: 'and a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together.' But this section does not say, and was not intended to mean, that the mere fact that the parties can no longer live together is sufficient upon which to base a decree of divorce. According to the plain wording and meaning of the section, there must be some cause other than those stated in the section deemed by the court sufficient; and, in addition thereto, the court shall be satisfied that the parties can no longer live together. The cause, of course, must be stated in the complaint."

See, also, *Poler v. Poler*, 32 Wash. 400, 73 Pac. 372; *Stanley v. Stanley*, 24 Wash. 460, 64 Pac. 732; *Colvin v. Colvin*, 15 Wash. 490, 46 Pac. 1029. If, therefore, we should take the respondent's assertion to the effect that it is impossible for him and his wife to longer live together at its full value, it would not justify the decree of the lower court.

Counsel for respondent however well say that if a sufficient cause is shown by the record why the parties cannot longer live together this court will affirm the judgment notwithstanding the trial court made no finding in regard thereto. But we cannot follow them in their contention that a sufficient cause does appear in the record. We think the respondent's abandonment of his home was wholly uncalled for, and unwarranted by any act on the part of his wife.

The decree appealed from is reversed, and the case remanded with instructions to dismiss the action.

[No. 8559. Department One. March 24, 1910.]

# C. S. Goshert *et al.*, *Appellants*, v. The City of Seattle *et al.*, *Respondents*.[1]

Municipal Corporations — Improvements — Contract—Call for Bids—Filing and Changing Specifications. Under a city charter requiring contracts to be let to the lowest bidder upon notice, at the time of publication of which notice plans and specifications must be filed and open to public inspection, the city makes such a material modification of the specifications filed as to invalidate subsequent proceedings, when, after filing the same and publishing notice, it sends out a circular letter to bidders to the effect that the specifications filed, particularly describing the materials and details of the construction of an electrical fire alarm apparatus, were intended only to define a standard of functions to be performed by the apparatus and equipment, and not to define or limit its type, design or construction, and that apparatus of any type, design or construction that would properly perform the functions indicated by the specifications, if satisfactory to the board and city electrician, will be acceptable to the city.

Same—Enjoining Municipal Contract—Parties Plaintiff—Taxpayers. Residents and taxpayers in a city may maintain an action to enjoin the letting of a contract required to be let to the lowest bidder, in violation of a charter provision requiring plans and specifications to be filed, and it is immaterial that the suit was commenced at the instance and cost of an unsuccessful bidder.

Appeal from a judgment of the superior court for King county, Main, J., entered October 1, 1909, upon findings in favor of the defendants, dismissing an action for an injunction, after a trial on the merits. Reversed.

*Todd, Wilson & Thorgrimson*, for appellants.

*Scott Calhoun, Bruce C. Shorts*, and *Harold Preston*, for respondents.

Gose, J.—The plaintiffs, taxpayers and residents of the city of Seattle, commenced this action for the purpose of enjoining the city and its board of public works from entering into a contract with the Star Electric Company for fur-

[1]Reported in 107 Pac. 860.

nishing the city with equipment for a fire alarm central office. Prior to the trial of the case, certain other taxpayers were permitted to intervene as plaintiffs. After a hearing on the merits, judgment was entered dismissing the case and taxing the costs to the plaintiffs and the interveners. The correctness of the judgment is challenged by this appeal.

In January, 1908, the city of Seattle passed an ordinance, section 1 of which provides:

"That the board of public works be and it is hereby authorized and directed to award a contract for the equipment of a manual and automatic fire alarm central office for the city of Seattle; said central office equipment to have a capacity of not less than forty (40) box circuit, ten (10) joker and ten (10) gong circuits, all as designed and specified by the city electrician." Ordinance, Seattle, No. 17,760.

Thereafter the city electrician prepared the specifications and filed them with the secretary of the board of public works. Thereafter, and on May 7, 1908, the board published a call for bids, to be received up to May 26, 1908. On May 19, a representative of the Star Electric Company called upon the chairman of the board and represented that his company could not bid upon the specifications as prepared and filed. Thereupon the board issued and mailed to all the parties who later submitted bids the following notice, omitting signature:

"May 20th, 1908.

"Office of the Board of Public Works.

"Notice to Contractors and Dealers in Fire Alarm Apparatus.

"Referring to the notice to contractors and dealers in fire alarm apparatus first published by order of the Board of Public Works under date of May 7th, 1908, advertising that sealed proposals will be received by the secretary of said board up to 11 o'clock A. M., Tuesday, May 26th, 1908, for furnishing for use of the fire department of the City of Seattle certain apparatus therein described. Referring also to the specifications issued by the city electrician under date of May 5th, 1908, under title, 'Specifications for Fire Alarm Office Equipment for the City of Seattle.'

"It appearing now from the inquiries made to this board

that there may be misunderstanding on the part of bidders as to the intent of the specifications referred to, you are hereby notified that such specifications were intended and are hereby construed to define a standard of functions to be performed by the apparatus and equipment to be purchased thereunder and to suggest appliances known to perform such functions, and not to define nor to limit the said apparatus and equipment as to type, design, constructions, make, patents or method of operation to those described in the said specifications, and that the instructions of this board in pursuance of which the said specifications and notice to contractors were issued, were to the effect that apparatus and equipment of any type, design, construction, make, patents or methods of operation which can be shown to properly perform the functions indicated by the said specifications to the satisfaction of the Board of Public Works and the city electrician, will be acceptable to this board and proposals covering same will be received and considered, but any contract awarded to cover any or all of said apparatus and equipment shall be subject to the terms and conditions in said specifications intended to govern the business features of the transaction.

"You are hereby notified further that in view of the possibility of misunderstanding on the part of bidders on the above points or if any impression which they might have formed from the wording of the said specifications to the effect that only such apparatus and equipment as would conform exactly to the appliances mentioned or described in the said specifications would be considered by or acceptable to the Board of Public Works, and that in the event of any such misunderstanding or incorrect impression, the time now remaining for the submittal of proposals under the original notice might be too short in which to re-estimate costs or to correct figures already prepared, the time up to which the Board of Public Works will receive proposals on the above mentioned apparatus and equipment is hereby set forward to eleven o'clock A. M., Tuesday, June 9, 1908.

"Bidders will be required to acknowledge receipt of this notice and to accept same as binding in connection with any proposals submitted or contract awarded under the said specifications."

In a letter accompanying the notice, the board stated that

it superseded the notice previously published. The bids were opened on June 9, and on June 13 the board accepted the bid of the Star Electric Company, and this suit was instituted and this appeal is prosecuted to enjoin the respondents from entering into a contract with it. Section 14, of article 8, of the city charter of the city of Seattle, provides:

"All public improvements to be made by contract shall be let to the lowest bidder therefor. Before awarding any such contract the board of public works shall cause to be published in the official newspaper of the city a notice, for at least ten days before the letting of such contract, inviting sealed proposals for such work, the plans and specifications whereof must, at the time of the publication of such notice, be on file in the office of the secretary of the board, subject to public inspection."

It is conceded that the plans and specifications were filed, and that the notice was given as directed by the charter.

The first and principal contention of the appellants is that the notice issued by the board of public works on May 20 is such a material modification of the specifications of the city electrician as to invalidate the subsequent proceedings of the board. We think this contention must be upheld. Not only does the ordinance provide that the contract shall be awarded for the equipment as designed by the city electrician, but, as we have seen, the charter of the city requires that the board shall, before letting the contract, cause a notice to be published inviting sealed proposals, "the plans and specifications whereof must at the time be on file in the office of the secretary of the board, subject to public inspection."

The contention of the respondents that the circular letter or notice is not a material modification of the specifications, but only an interpretation thereof, cannot be sustained. It is urged that its intent and purpose was simply to interpret and make certain that which the specifications left doubtful. An examination of the specifications discloses a full and detailed description of storage battery, controlling switch boards, relay switchboards, joker switchboards, gong line

switchboards, manual transmitter, registers, etc. Not only this, but they described with particularity the storage battery and switchboards, the material out of which the equipment shall be made, the finish, the details of construction and equipment and manner of operation, and numerous other details not necessary to set forth. The pith of the circular is that the specifications were intended, and are construed, to define a standard of functions to be performed and to suggest appliances known to perform such functions, and not to define or limit the apparatus and equipment as to type, design, construction, make, patents, or methods of operation; that equipment of any type, design, construction, make, patent or method of operation which performs the functions indicated by the specifications to the satisfaction of the board and city electrician will be acceptable; that bidders must accept the notice as binding upon them in any contract awarded under the specifications, but that the specifications shall govern the business features of the contract.

The language of the letter is clear and its meaning plain. Stripped of its superfluities, it means that bids shall be submitted on the basis of furnishing an efficient system to the satisfaction of the board, the specifications to control only as to the business features. It abrogates the specifications except as to their business features, and establishes in lieu thereof any equipment which the board and the city electrician may deem adequate and efficient. Obviously the letter cannot be said to be such specifications as the charter requires. The purpose of the charter provision is to prevent favoritism, extravagance, and fraud by furnishing specifications so full and complete as to afford an intelligent basis for competing bidders to act upon. Intelligent competition is the end sought. Surely it cannot be said that, where an expensive equipment of intricate mechanism is sought and no standard other than efficiency is fixed, there can be any intelligent competitive bidding. It will at once occur to the mind that there would be as many notions of efficiency as there were

bidders, and that no two bids would be made on the same basis. Moreover, there could be no standard of comparison for the board to act upon in considering the several bids and determining which was the lowest. The notice provides that it shall be made a part of the contract. The obligation of the contract would have to be measured not alone by the plans and specifications but by these and the notice. Instead, therefore, of each bidder bidding upon the same thing, the spectacle would be presented of bids being submitted upon different standards of efficiency. These suggestions have abundant support in the authorities.

In *Fones Hardware Co. v. Erb*, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353, the court considered a case where the county judge and bridge commissioners had adopted general specifications for building a bridge, but without having a definite plan and detailed specifications, advertised for "sealed proposals, competitive plans and specifications." The constitution of Arkansas provided that all such contracts should be given to the lowest responsible bidder. In discussing the meaning of the constitutional provision, as applied to the facts stated, the court said:

"It embodies three vital principles—an offering to the public, an opportunity for competition and a basis for an exact comparison of bids; and any statutory regulation of the matter which excludes or ignores either principle destroys the distinctive character of the system and thwarts the purpose of its adoption. Any arrangement which excludes competition prevents a letting to the lowest bidder; and it does not matter that such an arrangement maintains the form of public letting; if it excludes the essential principle of competition, there can be no real public letting."

The court further observed that the purpose which the law designed to accomplish was to afford an opportunity to all persons to bid upon the specific thing to be let according to plans previously adopted and made known; that general specifications were not sufficient, but it was essential that there should be such definite and detailed specifications as would

disclose the work to be done with fullness and detail, without which there could be no intelligent competitive bidding and no basis of comparison for ascertaining who in fact was the lowest bidder.

In *Wells v. Burnham*, 20 Wis. 119, it was held, in construing a statute requiring contracts to be let to the lowest bidder, that it was essential that the contract, plans and specifications should describe and specify definitely "the work to be done, the manner or style in which it was to be done, and the material to be used." In *Mazet v. Pittsburgh*, 137 Pa. St. 548, 20 Atl. 693, discussing the meaning of the phrase "lowest bidder," at page 563, it is said:

"The expression, 'lowest bidder,' necessarily implies a common standard by which to measure the respective bids, and that common standard must necessarily be previously prepared specifications of the work to be done, and materials to be furnished, . . .."

In *Sanitary District of Chicago v. Lee*, 79 Ill. App. 159, after examining numerous authorities as to the necessity for specific data as a basis for competitive bidding on work of a public nature, the court said:

"The *ratio decidendi* plainly is, that all matters essential to the contract to be let must be determined before advertising for bids, and that the advertisement, including documents to which it refers, must give full and definite information of the precise work to be done as a basis for intelligent bidding."

In *People v. Commissioners of Buffalo County*, 4 Neb. 150, it was held that the board of county commissioners could not enter into a contract for the construction of a bridge when the only competitive bidding was upon plans furnished by the respective bidders. The court said that, to permit the commissioners to accept plans and bids thereon at the same time, they accepting such as they approved, prevents competition and invites corruption, favoritism, and fraud. The same principle is announced in *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32; *Andrews v. Board of Commissioners*, 7 Idaho 453, 63 Pac. 592, and *Ertle v. Leary*, 114 Cal. 238, 46 Pac. 1.

There is little difference in principle between calling for bids upon specifications furnished by the bidder and calling for bids upon a notice that any type, design, construction, make, patent or method of operation will fulfill the requirements if it shall perform the functions indicated by the specifications "to the satisfaction of the board of public works and the city electrician."

The respondents cite *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *City of Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622, and *Mayor v. Flack*, 104 Md. 107, 64 Atl. 702. The *Gleason* case merely holds that a charter provision requiring contracts to be given to the lowest responsible bidder should be construed so as to fairly and reasonably accomplish its purpose. In the *Hosmer* case the specifications for lighting called for bids to furnish light on any plan that would furnish lights of two thousand candle power. This was held sufficiently definite. In the *Flack* case three separate and distinct sets of specifications were prepared, each complete in itself, upon which competitive bids were solicited for street paving. One set was for an asphalt block pavement, the second was for a vitrified brick pavement, and the third was for a bitulithic, the latter being a patented process. Two bids were submitted on vitrified brick, one on asphalt block, and three on bitulithic, one of the latter being accepted. Two contentions were made against the validity of the contract (1), that it was incumbent upon the public officers to determine in advance the precise material desired, and (2) that specifications could not be adopted which called for a patented article. The court overruled both contentions. Answering the first contention, it was held that, viewing it as a question of power only, it could make no difference whether the particular kind of pavement was selected before or after the bids were called for, when the specifications were complete, distinct, and descriptive of wholly different kinds of pavement, but all suited to the same general purpose. The court quoted with approval from the opinion of Judge

Cooley, in *Attorney General v. Detroit*, 26 Mich. 263, as follows:

"It would be the duty of the council, when all the bids are in, to examine all, and to select the kind of pavement for which the bids, all things considered, were relatively the lowest."

We do not read these cases as being at variance with the views we have expressed. The *Flack* case seems to be the one most relied upon by the respondents. In that case, as we have noticed, there were three sets of specifications, each complete in itself, each providing for a different kind of pavement. Bids were invited upon each set of specifications. When all bids were received, official duty was discharged, as Judge Cooley observed, by selecting the kind of pavement "for which the bids, all things considered, were relatively lowest."

But the respondents contend that the notice was issued so as to free the specifications from patented articles and thus permit open bidding, and that this was the intention of the board and of the city electrician in preparing them. If the board found that the specifications did not specify with sufficient detail, or that they contained undesirable matter, or that they were in some respects word pictures of certain patents, and that in these respects they were not desirable, the plain duty of the board was to reject all bids and to prepare and file satisfactory specifications and re-advertise for bids. If there is any doubt as to the correctness of our interpretation of the notice, that doubt is removed by the testimony of the expert witnesses, all of whom agree that it is widely at variance with the specifications.

We conclude, therefore, that the notice of May 20, issued by the board of public works, is so at variance with the spirit of the city charter and so indefinite as to invalidate all subsequent proceedings. This view will enable the city to so frame its specifications as to offer full opportunity for competitive bidding. Any other construction would render the charter provision wholly inefficient and impotent.

The court found that the plaintiffs and interveners were residents and taxpayers of the city at the time of the commencement of the action. As such they can maintain this action. The fact that the unsuccessful bidder will defray the expenses of the suit, and that it caused the suit to be commenced, does not change the rule. *Times Pub. Co. v. Everett*, 9 Wash. 518, 37 Pac. 695, 43 Am. St. 865. The view we have taken of the case makes it unnecessary to consider the other questions argued at bar and presented in the briefs.

The judgment will be reversed, with directions to grant a permanent injunction.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.

MORRIS, J., took no part.

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[No. 8316. Department One. March 25, 1910.]

BARBARA HUBER, *Appellant*, v. A. L. BROWN *et al.*, *Respondents*.[1]

TAXATION—TAX DEEDS—REQUISITES. A tax deed is not void on its face, where it is in the statutory form, recites the tax proceedings before the sale, and expresses the consideration in the language of the statute.

SAME—EXECUTION BY DEPUTY—VALIDITY. Under Rem. & Bal. Code, § 3939, empowering county treasurers to appoint one or more deputies, a deputy has power to execute a tax deed required by statute to be executed by the county treasurer.

SAME—ACKNOWLEDGMENT. The statute does not require a tax deed to be acknowledged.

SAME—TAX DEEDS—ACTION TO SET ASIDE—LIMITATIONS. A tax deed based upon a void judgment is within the protection of the statute of limitations requiring actions to cancel a tax deed to be commenced within three years after the date of the deed.

Appeal from a judgment of the superior court for King county, Main, J., entered April 18, 1909, upon sustaining a

[1]Reported in 107 Pac. 850.

demurrer to the complaint, dismissing an action to vacate a tax judgment and deed. Affirmed.

*Chauncey L. Baxter* and *John R. Wilson*, for appellant.
*Kenneth Mackintosh*, for respondents.

Gose, J.—This action was brought to vacate a tax judgment, and to set aside a tax deed executed upon a sale of real estate made pursuant to the judgment. The land was sold at a tax foreclosure sale on the 17th day of September, 1904, and the treasurer's deed was executed and filed for record on the same day. This action was commenced on the 26th day of December, 1908, four years and three months after the execution and filing of the tax deed, and more than one year after the passage and taking effect of the law of 1907 (Rem. & Bal. Code, § 162). The service was by publication, and certain facts are alleged in the complaint which the appellant asserts disclose a want of jurisdiction in the court to enter the tax judgment. The defendants demurred to the complaint on two grounds, viz., (1) that the complaint does not state facts sufficient to constitute a cause of action, and (2) that the action was not commenced within the time limited by law. The demurrer was sustained and, the plaintiff electing to stand upon her complaint, a judgment of dismissal and for costs was entered in favor of the defendants, from which she has appealed.

The duty of a county treasurer who has sold real estate upon a tax judgment is prescribed in Laws 1899, p. 299, § 18, as follows:

"The county treasurer shall execute to the purchaser of any piece or parcel of land a tax deed. The deed so made by the county treasurer, under the official seal of his office, shall be recorded in the same manner as other conveyances of real estate, and shall vest in the grantee, his heirs and assigns the title to the property therein described, without further acknowledgment or evidence of such conveyance and shall be substantially in the following form."

The respondents contend that the action is barred by the provisions of Laws 1907, page 398, which provide that such actions must be commenced within three years from and after the date of the execution of the treasurer's deed, provided that in actions not otherwise barred on deeds theretofore issued the act shall not apply if the action be commenced within one year after the passage of the act. Rem. & Bal. Code, § 162. The act was approved by the governor March 15, 1907.

The appellant first insists that the treasurer's deed is void upon its face, and that therefore the statute is inapplicable. Numerous authorities are cited which support the contention that a tax deed void upon its face is not such a deed as the statute contemplates, and that the statute does not operate as a bar to an action to set aside such a deed. The deed is executed in the form prescribed by the statute. Three objections are urged against its validity, (1) that the only consideration expressed in the deed is "in consideration of the premises;" (2) that the deed is executed by a deputy in the name of the treasurer; and (3) that the deed was not acknowledged. None of these objections are tenable. The deed, as we have stated, is in the statutory form, recites the tax proceedings anterior to the sale, and expresses the consideration in the language of the statute. This meets the requirements of the law. 10 Ballard, Law of Real Property, § 767; *Ward v. Huggins*, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.

Upon the second objection, the law is that a regular deputy of the principal officer has authority to execute a tax deed, either in the name of the principal or in his own name as deputy. 7 Am. & Eng. Ency. Law (2d ed.), 962. The same principle is announced in *State v. Devine*, 6 Wash. 587, 34 Pac. 154. The code, Rem. & Bal. Code, § 3939, empowers county treasurers to appoint one or more deputies. A tax deed executed in conformity to the statute conveys title without being acknowledged. *Ellis v. Clark*, 39 Fla. 714, 23

South. 410; 27 Am. & Eng. Ency. Law (2d ed.), 964. Finding that the deed is fair upon its face, we will not consider whether a void deed is within the protection of the statute.

The point is made that the published summons and the affidavit upon which it is based are so defective that the court did not acquire jurisdiction, and that the judgment is therefore void, and that a tax deed based upon a void judgment is not within the protection of the statute. This is no longer an open question in this state. A like question was made in *Hamilton v. Witner*, 50 Wash. 689, 97 Pac. 1084, 126 Am. St. 921, and in *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166. In the *Lara* case we said:

"Whatever the rule may be in other jurisdictions, it is firmly established in this state that a void tax deed may constitute a sufficient basis for the running of the statute of limitations."

In these cases the court was considering the seven-year statute of limitations, but we do not conceive that a different principle should obtain in applying the provisions of the act of 1907, which is special to tax deeds and general in its terms. Its purpose was to foreclose investigation as to the validity of the proceedings leading up to the judgment unless challenged within the time limited by the act. The precise question was raised in *Cordiner v. Dear*, 55 Wash. 479, 104 Pac. 780. Whilst this question was not discussed in the opinion, it was assumed that the law was settled in this jurisdiction adversely to the appellant's contention. The act of 1907 would serve no purpose if limited to deeds executed on sales regularly made upon valid judgments only. Such deeds need no legislative aid.

The treasurer's deed being fair upon its face, and the action having not been commenced within one year after the passage of the act of 1907, the demurrer was well taken, and the judgment is affirmed.

Rudkin, C. J., Chadwick, and Fullerton, JJ., concur.

[No. 8430. Department One. March 25, 1910.]

# R. H. Wells, *Appellant*, v. Ferry-Baker Lumber Company, *Respondent*.[1]

Master and Servant—Selection of Physician for Employee—Liability of Master. Where an employer withholds one dollar a month from the wages of employees and pays the same to a physician or surgeon selected by the employer to attend injured employees, he only owes the duty to use reasonable care in the selection of a competent surgeon, and is not liable for the negligence of the surgeon.

Physicians and Surgeons—Negligence—Reasonable Care—Use of X Ray. The evidence fails to show negligence of a physician in diagnosing a broken wrist as a sprain, where the fracture could only have been discovered by an X ray photograph, which is used only as a matter of extreme care, and many physicians practice without any X ray machine.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered March 24, 1909, upon granting a nonsuit at the close of plaintiff's case, dismissing an action in tort, after a trial before the court and a jury. Affirmed.

*Shepard & Flett*, for appellant.

*Brownell & Coleman* and *Cooley & Horan*, for respondent.

Gose, J.—On October 21, 1907, the appellant, the plaintiff below, while engaged in the discharge of his duties as a day watchman at the defendant's mill, fell from the conveyor onto a platform, a distance of about ten feet, and sustained serious injuries. The complaint, after alleging formal matters, the employment, fall, and the injuries sustained, avers, in substance, that the defendant exacted and withheld from the wages of each of its employees, including the plaintiff, the sum of one dollar per month, which it paid to a physician and surgeon of its selection for such professional services as he

[1]Reported in 107 Pac. 869.

should render them; that, as a result of the fall, the bones of each forearm were broken; that the doctor selected by the respondent negligently treated the left arm for a sprain and, as a result of the negligent diagnosis and treatment, it is deformed and its usefulness greatly impaired. The complaint also alleges that the doctor was incompetent as a surgeon, and that this fact was known to the defendant. At the close of the plaintiff's testimony, a judgment of dismissal was entered. The plaintiff has appealed.

The first and principal question to be determined is whether, under the averments in the complaint and the testimony, there was any legal obligation resting upon the respondent other than to select a competent surgeon. While the incompetency of the surgeon selected by the respondent is alleged in the complaint, no testimony was offered to support it, and it will not receive further notice. The averment, when reduced to its simplest form, is that the sum of one dollar per month was withheld from the wages of the appellant and other employees and paid to a physician or surgeon selected by the respondent, and that the negligence of the surgeon caused the injury complained of.

We think, under the decisions of this court, that the implied duty of the respondent was to select a competent physician and surgeon, and that when it did so it had discharged its full legal obligation. It is not claimed that there was any express contract between the company and the appellant, and the complaint expressly excludes the inference that any profit resulted to the respondent. It was, therefore, a non-compensated or gratuitous trustee, and is liable only for a failure to use reasonable care in the selection of a competent surgeon. In treating a similar case, in *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95, this court said:

"This hospital was maintained and the physician provided for the sole purpose of relieving sick and injured employees without expense to them and without any intention on the part of the company of making any profit out of the undertaking. It was therefore a charitable institution and it was

supported by the contributions of employees, and carried on in their interests. And if the company did employ the physician, as claimed by respondent, to look after and treat the sick and injured, it is not liable for his negligence, but is responsible only for want of ordinary care in selecting him."

The appellant, however, insists that this rule was not adhered to in *Sawdey v. Spokane Falls & N. R. Co.*, 30 Wash. 349, 70 Pac. 972, 94 Am. St. 880. In the *Sawdey* case the court adverts to the fact that the surplus in excess of the cost of treating the employees was retained by the company, and said: "There is therefore in this case both the element of contract and profit." In commenting on the *Richardson* case, the court said that it was not authority for the broad proposition that an employer who maintains a hospital for a profit, or contracts for a consideration to treat its injured employees, is not liable for the negligence of the physician he employs notwithstanding he exercises reasonable care in the selection of a physician. Torn from its setting, the word "consideration," as used by the court, might give color to the view that the rule in the *Richardson* case was modified, but the opinion as an entirety clearly shows that the word was used as synonymous with profit or anticipated profit. In the case at bar, the language of the complaint expressly negatives even an anticipated profit. The appellant cites *Phillips v. St. Louis & S. F. R. Co.*, 211 Mo. 419, 111 S. W. 109, 124 Am. St. 786, 17 L. R. A. (N. S.) 1167. This case holds, upon somewhat similar facts, that the deduction of a portion of the wages of the employee and the employment of the physician makes the physician the agent of the company and renders it liable for his acts of negligence. We think the rule announced by this court is the better and juster one, and it will be followed in this case. This conclusion requires an affirmance of the judgment. We will, however, consider the testimony which it is claimed makes a *prima facie* case of negligence on the part of the surgeon.

The learned trial court dismissed the case because in his

opinion there was no negligence shown. We concur in this view. Briefly stated, the evidence discloses that the surgeon at first expressed the opinion that both arms were broken, but said he would examine them with the X ray; that he did so, and then said that there was a fracture of the right wrist but that the left was sprained; that he so treated them; that the right wrist was restored to its normal condition; that upon complaint of the appellant from time to time that the left wrist was painful and not improving, he re-examined it with the X ray at least three times; that each examination confirmed his later opinion that it was sprained and not broken; that he said to the appellant, whenever he complained of the pain, that a sprain was "worse" than a break. The X ray examinations were what the physicians term fluoroscopic, which is made as the physician expressed it: "You use an X ray, but instead of taking a picture you have an apparatus that you hold in the hand and look through the arm." The only negligence claimed is that the defendant surgeon failed to take an X ray photograph so as to make certain his diagnosis.

A physician and surgeon by taking charge of a case impliedly represents that he possesses, and the law imposes upon him the duty of possessing, reasonable skill and learning. He is not liable for mistakes if he uses the method recognized and approved by those reasonably skilled in the profession. *Sawdey v. Spokane Falls & N. R. Co.*, *supra*.

"He does not undertake to effect a cure, or restore a broken limb to its normal condition. If he treats the injury with a reasonable degree of skill and care, he is not responsible for the results." *Peterson v. Wells*, 41 Wash. 693, 84 Pac. 608. See, also, *Pike v. Honsinger*, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. 655; *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577; *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593.

The conclusion is irresistible that the surgeon used reasonable diligence and skill, and that to permit a recovery would establish the rule that a surgeon is liable for a failure to use extraordinary care and diligence in both diagnosis and

treatment. The surgeon who testified that an X ray photograph should have been taken stated that he had practiced his profession for a period of twenty years and that he had never had an X ray machine. He examined the appellant for the first time about seventeen months after the injury, and took X ray photographs of the left wrist which he said showed a fracture which in his opinion a like investigation in the beginning would have revealed. Another surgeon said that the X ray was used only as a matter of extreme care. Viewing the testimony in the light most favorable to the appellant, it clearly shows that the attending surgeon used reasonable care, skill, and diligence in diagnosis and treatment. A verdict for the appellant could not be permitted to stand, and a judgment resting upon it would be set aside.

The judgment will be affirmed.

RUDKIN, C. J., CHADWICK, and FULLERTON, JJ., concur.

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[No. 8415. Department One. March 25, 1910.]

L. H. CRAVER, *Appellant*, v. AUGUST MOSSBACH, *Respondent*.[1]

JUDGMENTS—CONCLUSIVENESS—RECITALS—PARTIES BOUND—STRANGERS. The rule that recitals in a judgment are not subject to collateral attack where the court had jurisdiction, and there is nothing in the record to contradict the recitals, has no application as to strangers to the record not parties or privies; hence, where a tax title holder conveyed and warranted the title, his grantee, in an action on the covenant, may show failure of title by reason of defects in the summons.

TAXATION—DEED—ACTION TO SET ASIDE—TENDER—NECESSITY. A tender of taxes paid is sufficient to permit an action to set aside a tax deed, and need not be kept good, where the tender was not rejected because of its insufficiency, but because of contesting the title.

SAME—RECOVERY. Lack of evidence as to the sufficiency of a tender of taxes, where the tender had been waived, is not ground for refusing to vacate a void tax deed.

[1]Reported in 107 Pac. 1037; 109 Pac. 1016.

TENANCY IN COMMON—RIGHT TO RECOVERY—POSSESSION—PARTIES. A tenant in common is entitled to recover possession of the entire estate, as against every person other than the cotenant.

APPEAL—REVIEW—EXCEPTIONS. Findings not excepted to are binding.

TRIAL—REJECTION OF DEED—APPEAL—RECORD. Upon the conditional rejection of a deed offered in evidence, the deed will be considered as in evidence on appeal, where otherwise the appellant would have been misled.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 7, 1909, upon findings in favor of the defendant, in an action to vacate a tax sale and recover possession of real property, after a trial on the merits before the court without a jury. Reversed.

*A. C. MacDonald*, for appellant.

*Richard Saxe Jones*, for respondent.

PER CURIAM.—On April 7, 1891, Ernest Luckner became the owner in fee simple of lot 8, in block 1, of Mills & Randall's Canal addition to the city of Seattle. He died intestate on December 2, 1899, without having disposed of the property, leaving as his wife Minna Luckner, and five children, Bernard, Anton, Annie, Louise, and Emma. The taxes were suffered to become delinquent on the property and a delinquency certificate therefor was taken out on October 16, 1900, by one C. P. Rollins, and in the November following, proceedings were begun to foreclose the same. These proceedings were prosecuted to judgment, resulting in a sale of the property, at which sale Rollins became the purchaser for the amount of the taxes then due and the costs of the foreclosure proceedings. Subsequently Rollins conveyed his interests to the respondent, Mossbach.

On June 17, 1907, Minna Luckner, Anton Luckner, Louise Luckner, Anna Papenberg, and Emma Pankow, by quitclaim deed, conveyed their interests in the property to the appellant. Thereafter the appellant began the present action against the respondent Mossbach and others to recover

possession of the property, averring in his complaint that the foreclosure proceedings were void for want of sufficient service, and that he was the owner of the property in virtue of the quitclaim deed above described.

On the trial the appellant offered evidence tending to support his averment as to the foreclosure proceedings, and certified copies from the county records showing mesne conveyance from the government of the United States to Ernest Luckner. He then offered in evidence the deed from the heirs of Ernest Luckner to himself. This deed was rejected as evidence by the court, apparently for the reason that the grantors were in no way connected with the title of Ernest Luckner. The appellant thereupon introduced the deposition of Anna Papenberg, who testified that she was a daughter of Ernest Luckner; that her father died December 2, 1899; that he left as his sole heirs at law the grantors named in the quitclaim deed to appellant, together with one Barnard Luckner, a son, who had died some three years prior to its execution. She also testified that her mother, who had joined in the deed, was not then of perfectly sound mind. The appellant further offered evidence tending to show a tender to the respondent of the amount of taxes and penalties paid by him to the county and state, and then rested.

The court thereupon announced that it would render judgment for the respondent, and subsequently made findings of fact in which it found that Ernest Luckner was the owner of the property at the time of his death, that respondent was in possession of the property, and that the foreclosure proceedings were regular and sufficient. It found that $70 had been tendered respondent as taxes prior to the commencement of the action, but averred that it was unable to find from the evidence whether or not this was a sufficient tender. On the question of the appellant's title it made the following findings:

"(4) That on or about the 17th day of June, 1907, the plaintiff in this action accepted a quitclaim deed from

Minna Luckner, Anton Luckner, Louise Luckner, Anna Papenberg, and Emma Pankow, describing that the parties conveyed to the plaintiff all of their interest in Lot Three (3) Block One (1) Mills & Randall's Canal Addition; that at the time of making said deed Ernest Luckner was dead, having died in the city of Chicago and leaving, among other heirs, a son known as Bernard Luckner.

"(5) That no other evidence was introduced in this action of any interest, title or right in the plaintiff L. H. Craver, than such as came to him by reason of said quitclaim deed from Minna Luckner, Anton Luckner, Louise Luckner, Anna Papenberg, and Emma Pankow.

"(6) That Minna Luckner, one of the persons making said quitclaim deed, was the wife of Ernest Luckner, deceased, and was of unsound mind at the time of making the quitclaim deed heretofore referred to, having insufficient ability and knowledge to properly convey said property."

It also found that the appellant had never been in possession of the property, and that the appellant's claim of interest therein was wrongful. As conclusions of law it found that the respondent was entitled to a judgment against the appellant to the effect that the appellant take nothing by his action, and that the respondent was entitled to a decree quieting his title as against the appellant's claims. Judgment was entered accordingly.

The judgment must be reversed. The summons in the tax foreclosure proceedings was by publication, and was insufficient under the rule announced by this court in *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Smith v. White*, 32 Wash. 414, 73 Pac. 480; *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536; *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640; and *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462. The summons being insufficient and void, it follows as of course that the judgment entered thereon is void, and that the respondent, in so far as his claim of title is based upon the foreclosure proceedings, has no interest in or claim to the property. The tender was ample enough to permit the appellant to maintain the action. It was not rejected be-

cause of its insufficiency, but because the respondent intended to contest the appellant's claim of title. There was, therefore, no necessity for keeping it good or bringing it into court. The court could properly, if the respondent so requested, in the exercise of its equitable powers, find the amount of taxes paid by him and make their payment to him, or into court for him, a condition precedent to letting the appellant in possession of the land, but because the court is unable to find from the evidence offered whether the tender was in the full amount of the taxes paid by the respondent is no reason for denying the appellant the right to recover his property.

On the question of title the evidence shows that the appellant acquired by his deed from the heirs of Ernest Luckner a valuable interest in the land in question, depending in quantity on the question whether the property was originally the separate property of Ernest Luckner or the community property of Luckner and his wife. But this question is not material here. By his deed the appellant became a tenant in common of the property with the wife of Luckner, and the rule in this state is that a tenant in common is entitled to the possession of the entire estate as against every person other than the cotenant, and may recover possession of the entire property when held by a stranger to the common title. *Allen v. Higgins*, 9 Wash. 446, 37 Pac. 671, 43 Am. St. 847.

The respondent argues that the deed through which the appellant derives title is not before the court, as it was rejected when offered and was not subsequently reintroduced. But the appellant is estopped to make this contention by reason of the finding of the court above quoted. No exception was taken to this finding, and it became binding upon both parties. Moreover the rejection of the deed when offered was conditional, and the appellant had the right to rely on the action of the court treating it as properly in

evidence. Any other rule would mislead him to his prejudice.

The judgment is reversed, and the cause remanded with instructions to enter a decree in favor of the appellant awarding him the possession of the property.

## On Petition for Rehearing.

[Decided July 26, 1910.]

Per Curiam.—In a petition for a rehearing the respondent complains that the disposition of the foregoing case which this court has directed to be made will have the effect, unless modified, of denying him the right to present his defense to the appellant's cause of action. Our attention is called to the fact that the judgment was rendered at the conclusion of the appellant's evidence in chief—the court then deeming that the facts presented warranted a judgment for the respondent even though uncontroverted—and that he has had no opportunity to contest the validity of certain of the documents on which the appellant relied, and which the trial court deemed immaterial, but which this court thought sufficient to warrant a judgment for the appellant. The complaint we feel is just, and the order of the court will be that the judgment appealed from be reversed and the cause remanded for a new trial.

[No. 8441. Department One. March 25, 1910.]

# LUIGI ONGARO, *Appellant*, v. JOHN TWOHY *et al.*, *Respondents*.[1]

MASTER AND SERVANT—FELLOW SERVANTS—POWDERMAN AND LABORER—RULE IN ANOTHER STATE—RECOVERY. Under the decisions of the supreme court of Idaho, and the laws of that state, a foreman and powderman engaged in blasting and drilling operations at the top of a cut in railroad construction work in that state, are fellow servants of a common laborer engaged in shoveling rock and earth in the cut below; and no recovery can be had against the master in this state for negligence of the fellow servants.

TRIAL—QUESTIONS OF LAW OR FACT—LAW OF OTHER STATE. It is a question of law for the court, and not one of fact for the jury, where the only evidence as to the law of another state was the opinion of an attorney of that state as to the proper legal inference to be drawn from certain decisions of the supreme court of such state.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered April 19, 1909, upon the verdict of a jury rendered in favor of the defendants by direction of the court, dismissing an action for personal injuries sustained by a common laborer through the negligence of a foreman and powderman in firing a blast. Affirmed.

*Maurice Smith, Gallagher & Thayer* and *Gallagher, Smith & Mack*, for appellant, contended that the fellow servant rule depends upon the "character of the act" performed, and this is the New York rule, as distinguished from the Ohio rule, in both Idaho and Washington, as shown by the following cases: *Snyder v. Viola Mining & Smelting Co.*, 3 Idaho 28, 26 Pac. 127; *Zienke v. Northern Pac. R. Co.*, 8 Idaho 54, 66 Pac. 828; *Larsen v. La Doux*, 11 Idaho 49, 81 Pac. 600; *Metzler v. McKenzie*, 34 Wash. 470, 76 Pac. 114; *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830; *Mast v. Kern*, 34 Ore.

[1]Reported in 107 Pac. 834.

247, 54 Pac. 950, 75 Am. St. 580; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521.

*Edward J. Cannon* and *Arthur B. Lee*, for respondents.

PER CURIAM.—This case was before this court on a former appeal and is reported in 49 Wash. 93, 94 Pac. 916, where a statement of the facts giving rise to the controversy will be found. After the cause had been remanded on the former appeal, the defendant asked and obtained leave to amend his answer, and, pursuant thereto, set up as an additional defense that the tort on which the action was founded was committed in the state of Idaho, and that the rights of the parties are governed by the laws of that state; setting up further that, by the laws of the state of Idaho, the foreman, Roman, who this court held in its former opinion was a vice principal and not a fellow servant of the plaintiff Ongaro, was a fellow servant of the plaintiff, and that the defendant was not liable for his negligent acts. Issue was taken on these allegations and a trial entered upon, at which the respondent offered evidence to substantiate the allegations. No evidence was offered on the other side by the appellant, he relying upon the testimony offered by the respondent. At the conclusion of the case, the court sustained a challenge to sufficiency of the evidence and entered a judgment of dismissal, holding that, under the laws of Idaho, the foreman and the appellant were fellow servants, and that the respondent was not liable for the foreman's negligence.

To prove his case the respondent produced an attorney of the state of Idaho who gave it as his opinion that, under the facts shown in the record, no recovery could be had in the courts of that state, citing cases from the supreme court as sustaining his opinion. The appellant in this court takes issue with the witness in his construction of these cases and argues that they do not sustain his opinion, but, on the contrary, do not lay down a rule different from that applied in this state. But we think the cases cited justify the opinion

of the witness. While they are not similar in their facts to the case at bar, they make clear the general principles involved, and show that the rule as to fellow servants as applied in that state differs widely from the rule as we have applied it here. It makes it clear, for example, that the Idaho courts follow the rule as presently announced by the supreme court of the United States, as evidenced by the cases of *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368; *Alaska Min. Co. v. Whelan*, 168 U. S. 86, and *New England R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, while this court has expressly refused to follow the rule of these cases on the doctrine of fellow servant, preferring the rule earlier announced by that court, as evidenced by the case of *Chicago M. & St. P. R. Co. v. Ross*, 112 U. S. 377, and the cases therein cited. *Mullin v. Northern Pac. R. Co.*, 38 Wash. 550, 80 Pac. 814. These rules are so radically different that the supreme court of the United States felt compelled to overrule its earlier cases in order to make the change.

The appellant further argues that the court erred in determining for itself, from the proofs offered in evidence, what the law of Idaho was at the time the injury in question occurred, but contending that the question should have been submitted to the jury. The authorities seem not to be in harmony on this question, but we are clear that in any view there was no error committed here. There was no disputed questions of fact to be determined; on the contrary, there was no dispute in the evidence at all. The sole question was what were the proper legal inferences to be drawn from the facts proven, and this clearly was for this court.

The judgment is affirmed.

[No. 8524. Department One. March 25, 1910.]

# HARRY BRODSKY, *Appellant*, v. MAGNUS NELSON *et al.*, *Respondents*.[1]

DEEDS—DESCRIPTION—CERTAINTY. A deed of the "west half of the south of the southwest section twenty-two" is indefinite and uncertain, and insufficient to show title to the north half of the southwest quarter of the southwest quarter of the section.

QUIETING TITLE—EQUITABLE TITLE OF PLAINTIFF—TAXATION—DEED—ACTION TO SET ASIDE—POSSESSION. Equitable title to property, under a quitclaim deed with a faulty description (which might be reformed), is sufficient to authorize an action to quiet title and set aside a void tax title, nor is it necessary that the plaintiff be in possession.

SAME—PROOF OF EQUITABLE TITLE—SUBSEQUENT DEED—ADMISSIBILITY. Where the plaintiff in an action to quiet title and set aside a void tax title held a superior equitable title, before suit brought, under a deed with a faulty description that might be reformed, a quitclaim deed correcting the error, received by the plaintiff after commencement of the action, is admissible to supply proof of the error in the original deed upon which an action of reformation could have been based.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 14, 1909, upon findings in favor of the defendants, dismissing an action to quiet title, after a trial on the merits before the court without a jury. Reversed.

*Judd & Olson*, for appellant.

*Revelle, Revelle & Revelle*, for respondents.

FULLERTON, J.—In this action the appellant, claiming to be the owner of a tract of land described as the north half of the northwest quarter of the southwest quarter of section twenty-two, in township twenty-two, north, of range five, east of the Willamette Meridian in King county, Washington, sought to have cancelled as a cloud upon his title a tax

[1]Reported in 107 Pac. 840.

deed thereof issued by the county treasurer. In his complaint the appellant alleged his ownership of the property, that the respondents held a tax deed thereto, that he had tendered to them the full amount of the taxes levied by the taxing officers and paid by them to the county, and facts tending to show that the tax deed was void. Issue was taken on the complaint and a trial entered upon, in which the appellant sought to show his capacity to sue by deraigning his title from the government of the United States. He put in evidence a chain of mesne conveyances showing title from the government to one J. Wilfred Stockton, and then offered a quitclaim deed, properly executed and acknowledged from Stockton to himself, executed prior to the commencement of the action, in which the land conveyed was described as follows: "The west half of the south of the southwest section twenty-two," etc. On this being rejected, he offered in connection therewith another quitclaim deed, also duly executed and acknowledged, which properly described the property, but of a date subsequent to the commencement of the action. The latter deed contained a recital to the effect that it was executed to make definite and certain the deed between the same parties above mentioned containing the defective description. This offer was also rejected, whereupon the appellant announced that he had no further record evidence to offer tending to prove his capacity to sue. The court thereupon directed a dismissal of the action on the ground that the appellant had no capacity to sue at the time of its commencement, and entered a judgment accordingly

The appellant undertakes to show, by eliminating what he deems surplusage in the description, that the deed first offered in evidence is sufficient to pass the legal title to the property sued for from Stockton to himself; but, without following his argument in detail, we think it wholly insufficient for that purpose. By striking out all that precedes the words "Section twenty-two" it could be said that the deed contained a sufficient description of section twenty-two, and,

on the principle that the whole includes the part, that it conveyed to the appellant the fractional quarter section described in his complaint. But we know of no rule of construction that would permit this. Manifestly the grantors named in the deed intended to convey some fractional part of the section, not the whole of it, and since that fractional part is not made certain, it must be held that the deed is insufficient to convey a legal title to any part of the section.

But we do not think the appellant's action should fail merely because he failed to show a legal title to the property. In this state it is provided by statute that any persons having a valid subsisting interest in real property may recover the same or have a judgment quieting or removing a cloud from his title, notwithstanding he may not hold the strict legal title. It is enough for that purpose that he have an equitable title to the property if the title he holds be the superior title. Rem. & Bal. Code, §§ 785, 793. In this instance it is manifest that the appellant had an equitable title to the property. The deed, although faulty in description, was one capable of being reformed in that respect even as against the will of the grantors. *Elwood v. Stewart*, 5 Wash. 736, 32 Pac. 735, 1000; *Commercial Nat. Bank v. Johnson*, 16 Wash. 536, 48 Pac. 267; *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644; *Land Mtg. Bank of N. W. Amer. v. Nicholson*, 24 Wash. 258, 64 Pac. 156; *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320, 55 Pac. 210. And this although the deed was a quitclaim without covenants of warranty. *Deford v. Mercer*, 24 Iowa 118, 92 Am. Dec. 460. Nor is it material whether or not the appellant was in possession of the property. *Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483; *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264; *Carlson v. Curren*, 48 Wash. 249, 93 Pac. 315.

The appellant's equitable title to the property became a legal title after the execution of the subsequent deed. While this title could not relate back to the time of the original

deed so as to make that deed effectual had legal title in the appellant been essential to the maintenance of his cause of action, yet it aids it, nevertheless, because it supplies the proofs that the appellants might otherwise have had to introduce by parol; namely, that the original deed was intended to convey the particular tract of land in question and was otherwise sufficient on which to base action for reformation.

Since, therefore, the appellant was able to show a superior equitable title in himself to the property acquired prior to the commencement of action, derived from the original source of title, he should have been permitted to show, if he could, the invalidity of the respondent's tax title, and we hold that it is error to refuse to permit him so to do.

The respondents cite and rely upon, among cases from other jurisdictions, the following cases from this court: *Shelton Logging Co. v. Gosser*, 26 Wash. 126, 66 Pac. 151; *Hughes v. South Bay School Dist. No. 11*, 32 Wash. 678, 73 Pac. 778, 74 Pac. 333, and *Humphries v. Sorenson*, 33 Wash 563, 74 Pac. 690, but those cases are not in point. While they hold that one must have a valid subsisting interest in real property in order to maintain an action concerning it, they are not authority for the proposition that the appellant in the instant case did not have in this property such an interest.

The judgment is reversed and remanded for a new trial.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 8545. Department One. March 25, 1910.]

# H. COLEMAN *et al.*, *Respondents*, v. SECURITY SAVINGS SOCIETY, *Appellant*.[1]

JUDGMENT—BY DEFAULT—VACATION. A misunderstanding between counsel, in which each acted in good faith, resulting in a default judgment, may be sufficient to warrant the court in opening the default, where the right to trial on the merits is not denied.

TAXATION—APPORTIONMENT—TO PART OWNER—NOTICE. By Rem. & Bal. Code, § 9234, notice of application for apportionment of taxes on a tract of land, by the owner of a part, need not be given where the assessed valuation of the tract is less than $2,000.

SAME—APPORTIONMENT—REDEMPTION—MISTAKE IN CERTIFICATE—EFFECT. Proceedings for the apportionment of taxes on a tract of land, followed by a redemption of the part of the applicant, are not affected by a mistake of the taxing officer in describing the land in the redemption certificate.

SAME—PROCEDURE FOR APPORTIONMENT—PRESUMPTIONS. Where an act for the apportionment of taxes requires the treasurer to carefully investigate and ascertain the proportionate value of the parts sought to be segregated and divide the assessment on that basis, without providing any procedure, he may adopt the procedure deemed most fitting, and will be presumed to have done his full duty, in the absence of a showing that the apportionment is unjust.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 8, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to vacate a tax foreclosure judgment. Affirmed.

*P. C. Shine*, for appellant.

*Cohn & Blake*, for respondents.

FULLERTON, J.—This is a proceeding by petition under the code to vacate a judgment in a tax foreclosure proceeding. From the record it appears that in December, 1908, the treasurer of Spokane county issued a certificate of delinquency for unpaid taxes levied upon land, described as a

[1]Reported in 107 Pac. 842.

single tract, situated in that county. In September, 1904, J. F. Congleton, one of the plaintiffs, being then the owner of a part of the property covered by the certificate of delinquency, applied to the treasurer of Spokane county, asking to have the taxes apportioned so that he might pay such part of the tax as was justly chargeable against his part of the property. The county treasurer made the apportionment as requested, whereupon Congleton paid the tax chargeable against his property into the county treasury and took out a certificate showing its redemption from the certificate of delinquency. Thereafter, and on October 10, 1904, the appellant, then holding the delinquency certificate, received from the treasurer the money so paid. For the year 1904, and for each of the subsequent years, the parties owning the two tracts paid taxes upon the separate portions. In 1907 the appellant began proceedings to foreclose his delinquency certificate against the entire tract, alleging in his application therefor that the apportionment made by the treasurer was illegal and void. He made defendants all of the parties named as respondents in this action, causing them to be served with process, and after time for answer had expired took a judgment by default foreclosing its certificate. This application to vacate the judgment was thereupon filed and a hearing had, at the conclusion of which the court vacated the judgment in so far as it affected the property on which the taxes were paid by Congleton after the apportionment made by the county treasurer. This appeal was taken therefrom.

The appellant first questions the sufficiency of the showing offered by the respondents to excuse their default in the foreclosure proceedings, but without reviewing the evidence on the point, we think the respondents made out a case of mistake and inadvertence on their part sufficient to excuse their action in that behalf. The failure to appear and defend was due to a misunderstanding between counsel, in which doubtless each was acting in good faith, but of suffi-

cient moment to warrant the interference of the court, since the appellant was not denied the right thereby to try the merits of its case.

It is next contended that the apportionment proceedings had by the county treasurer were void. This is based upon three several grounds, the first of which is that no notice was given the respondents of the application to the treasurer. But the statute (Rem. & Bal. Code, § 9234), only requires notice in those cases where the assessed valuation of the tract to be divided exceeds two thousand dollars, and here the valuation was less than that sum.

Next it is said that the description in the property in the certificate of redemption is erroneous. This is true in the sense that the part sought to be excepted from the redemption is erroneously described, but this does not invalidate the proceedings. Neither the respondents' title to the tract segregated, nor the title of the appellant to the remainder acquired by the foreclosure proceeding, depend upon this description. It was but the mistake of the taxing officer, and since the record makes clear what tract was intended, it was properly corrected in the order and judgment of the court in this proceeding.

The third ground of the objection is that the procedure pointed out by statute was not substantially followed by the treasurer in making the apportionment. But the statute prescribes no particular procedure. It provides that when an application for an apportionment is made the treasurer must carefully investigate and ascertain the relative or proportionate value the part sought to be segregated bears to the whole tract assessed, and divide the assessment on that basis, but no method of proceeding is pointed out. The officer, therefore, was at liberty to adopt the procedure that seemed to him most fitting to make the ascertainment, and in the absence of a showing that the apportionment as made is inequitable or unjust, the law presumes that the officer did his full duty in that regard.

Finally, it is objected that the petition and proofs are insufficient to sustain the judgment, for the reason that it was not alleged or proven that the taxes paid by the appellant had been tendered it. But, aside from the fact that we think the evidence fully justifies the finding that the appellant received the money paid to the treasurer at the time the taxes were apportioned by that officer, it is not necessary either to allege or prove a tender of the taxes to the appellant. The method of redeeming from a certificate of delinquency is through the county treasurer, made so by statute, and it is to that officer the redemption money must be paid. The respondents therefore sufficiently complied with the statute in this respect.

The judgment appealed from is affirmed.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

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[No. 8560. Department One. March 25, 1910.]

## H. SWEENEY, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—SPECIAL INJURY—ABUTTING OWNERS—INSTRUCTIONS. An abutting property owner upon an alley, which he uses for access to his property, suffers a special damage by its obstruction which differs in kind from that suffered by the general public; and it is error to instruct the jury that he cannot recover if his damages were of the same character and kind as those sustained by owners of other property on the alley, and the general public.

SAME. Such an instruction is not cured by recalling the jury and expressly refusing to change it, but adding that what was meant was that plaintiff could not recover if he suffered only the damages of inconvenience suffered by the general public.

Appeal from a judgment of the superior court for King county, Gay, J., entered December 2, 1909, upon the verdict

[1]Reported in 107 Pac. 843.

of a jury rendered in favor of the defendant, in an action for damages for obstructing an alley. Reversed.

*Charles E. Congleton* (*Milo A. Root*, of counsel), for appellant.

*Scott Calhoun* and *Bruce C. Shorts*, for respondent.

FULLERTON, J.—In the summer and fall of 1908 the appellant was engaged in the plumbing, heating and steam-fitting business in the city of Seattle, having his place of business in a certain storeroom and basement room underneath the storeroom which he held under a lease from the owner. The storeroom faced on one of the principal streets of the city and was used by appellant for the purpose of displaying his goods, and for office purposes; the basement opened into an alley at the rear of the building and was used as a place for storing goods. The alley ran north and south through the block, was sixteen feet wide, and opened onto streets at each end, furnishing an easy means of approach to the basement door for teams hauling supplies to and from the appellant's place of business. In the fall of 1908 the city of Seattle began the work of grading the street at the north end of the alley, and in the prosecution thereof caused a fill to be made at the mouth of the alley which shut off access to it for a time from that end. The appellant thereafter brought this action against the city, alleging that by blocking the end of the alley the city had made it impossible for him to use the alley in the pursuit of his business, thereby compelling him to vacate the leased premises, procure a new site, and erect new buildings at a great expense. The city took issue on the allegations of the complaint, and a trial was had before a jury, during the progress of which the court gave to the jury the following instruction:

"You are further instructed that if you find the damages sustained by the defendant were of the same character and kind as those sustained by the owners of other property on

the alley and the public generally, you must find for the defendant, and I further instruct you that the fact that the plaintiff used the alley more often than most others makes a difference only in a degree and not in the character of the damage."

After the jury retired an exception was taken to the instructions, whereupon the court recalled the jury and reread the instruction, making the following comment:

"Now, gentlemen, I am not going to change one single word of that instruction in order even to emphasize it to you, but what that was meant to say was: If you believe that the damages that the plaintiff suffered were the general damages of inconvenience such as the public in general suffered, then he cannot recover."

The jury thereafter returned a verdict for the city, on which judgment in its favor was entered. The appellant prosecuted this appeal therefrom, assigning as error the giving of the instruction above quoted.

Manifestly the instruction is erroneous. While a property holder in order to recover damages for the obstruction or vacation of a public highway must suffer a special damage therefrom different in kind from that suffered by the general public, it is not the rule that he must suffer a damage peculiar to himself alone. Many persons may suffer a damage for one such single act, yet the damage be special to each of them. For example, many persons may own property abutting upon a street which furnishes the only means of access to their property. Clearly, if the street should be obstructed or vacated, each of such persons whose access to his property should be prevented thereby would suffer a special damage different in kind from the general public whose only right in the street was the right to use it as a public way. So in this case, the appellant's right to recover for the losses the obstruction to the alley caused him is not barred because others to whose property the alley furnished the only convenient means of access may have suffered a

like loss. Instead of the fact operating as a denial of the right of any such injured person to recover for the injury suffered, every such person may recover for the obstruction, as their damages differ in kind from that suffered by the general public. *Sholin v. Skamania Boom Co.*, 56 Wash. 303, 105 Pac. 632; *Lund v. Idaho & Wash. N. R.*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. 916; *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *Smith v. Centralia*, 55 Wash. 573, 104 Pac. 797; *Heller v. Atchison etc. R. Co.*, 28 Kan. 625.

It is suggested, however, that the error in the instruction was cured by the explanation made by the court at the time the jury were recalled, but it will be noticed that the court did not change its definition of general and special damages; it only emphasized the fact that the jury must find that the damages suffered by the appellant differed in kind from that suffered by the general public before he could recover, leaving its definition of those terms unchanged. The jury must obtain its knowledge of the law of the case from the charge of the court. If this be erroneous, then the verdict must be erroneous also, since it is founded on erroneous principles of law.

The judgment is reversed and a new trial granted.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 8439. Department Two. March 25, 1910.]

# GROVER WIEMANN, *Respondent*, v. JACKMAN RAILWAY COMPANY *et al.*, *Appellants*.[1]

MASTER AND SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY. The negligence of the defendants in sending a roller coaster car up an incline while an employee was working on the track, is for the jury, where there was evidence tending to show that the plaintiff was set to work there by the manager, who promised to take care of him while at work, but sent up a car contrary to custom, which was a very dangerous proceeding.

SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. An employee knocked from a roller coaster track by a car is not guilty of negligence contributing to his injury, by reason of having taken a position with his back to the car, when he could not have seen the car in time to have escaped the injury if he had been facing it.

SAME. In an action for injuries to an employee working upon a roller coaster track by being struck by a car, evidence that the attachment of a car to the chain would have given notice to one working on the chain does not show contributory negligence in not heeding the notice, where it does not appear that plaintiff had commenced work on the chain when the car was attached.

SAME—PROXIMATE CAUSE. Upon the question of the contributory negligence of an employee knocked from a roller coaster track by a car, it is immaterial that he exposed himself to the danger of having his clothes caught on the chain, that not being the cause of the injury.

TRIAL—INSTRUCTIONS—ISSUES—HARMLESS ERROR. A technically erroneous instruction purporting to state the issues, and alluding to the plaintiff's expectancy of life as if alleged in the complaint (which only alleged his age), does not require a reversal where it did not state what the life expectancy actually was.

TRIAL—INSTRUCTIONS—EVIDENCE—BURDEN OF PROOF. Where there are correct general instructions as to the burden of proof and the preponderance of the evidence, it is not error to precede other instructions by the introductory clause, "If you find from the evidence" and so-forth, without repeating the previous general instructions.

MASTER AND SERVANT—CUSTOMARY ACTS—INSTRUCTIONS. It is not error to give an instruction as to the custom of not sending up a roller coaster car while a man was at work on the track, where sev-

[1]Reported in 107 Pac. 844.

eral witnesses who had worked there testified that they never had known it to be done, especially in view of the evident danger in doing so.

APPEAL—REQUISITES—EXCEPTIONS. Error cannot be predicated upon rulings of the trial court to which no exceptions were taken.

Appeal from a judgment of the superior court for King county, Gay, J., entered July 6, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries. Affirmed.

*Walter B. Beals* and *Morris, Southard & Shipley*, for appellants.

*James Kiefer* and *L. A. Michelson*, for respondent.

PARKER, J.—This is an action to recover damages on account of personal injuries, alleged to have been received by the plaintiff as the result of the negligence of the defendants, who are owner and manager respectively of a roller coaster railway at an amusement resort in Seattle. The device consists of a track maintained at different elevations along its course upon which small cars are run to carry passengers. The structure is about fifty feet above the ground at its highest point. The cars are elevated to this point by an endless chain along an incline portion of the track, which incline is about 150 feet long. The cars then continue their course by force of gravity along the further course of the track, which is varied by numerous curves and different grades to the starting place at the foot of the incline. The chain revolves over a sprocket wheel just beyond the highest point of the incline, where the cars are automatically released from the chain to continue their course by force of gravity, the chain revolving back under the structure where the power is applied to it. The chain runs in a box or trough up the incline over the highest point to the sprocket, in the middle of the track and on the same level. The upper sprocket wheel revolves upon a shaft supported at the ends by two timbers running lengthwise between the chain trough

and track about 15 inches below the track. The ends of this shaft are held in place by set screws so as to adjust the position of the sprocket and keep the chain at proper tension. The set screws extend from the ends of the sprocket shaft back between the tracks and the chain trough, but about a foot lower. If a man were at work adjusting the set screws he could not see a car coming up the incline until it was very near the summit and within a short distance of him. In adjusting the set screws one has to stand on the framework and timbers of the structure, there being no floor to work upon.

On July 11, 1908, the plaintiff, then in the employ of the company, was directed by its manager, Carpenter, to go to the upper sprocket wheel and tighten the chain by means of the set screws, and while doing so he fell from there to the ground and received the injuries for which he seeks recovery. There is no dispute as to the foregoing facts. It is charged against the defendants that they negligently caused a car to be sent up the incline while plaintiff was at work tightening the chain, knowing he was there, and that if a car was then sent up the plaintiff must inevitably be struck by the car and thrown from the structure to the ground. That he was so struck by the car and thrown to the ground, receiving the injuries for which he claims damages. Defendants deny negligence upon their part, and allege that plaintiff's injuries were caused by his own fault and want of care. A trial before the court and a jury resulted in a verdict in plaintiff's favor. Defendants moved for a new trial which was denied, and judgment was entered accordingly, from which they have appealed.

It is first contended that the evidence of appellants' negligence was not sufficient to support the verdict, and that the evidence shows respondent's injuries were the result of his own contributory negligence. Appellants contentions upon this branch of the case seem to be based upon two theories: (1) that no car was sent up the incline while plaintiff was tightening the chain; and (2) that respondent, but for his

own negligent manner of doing the work and want of care, could have extricated himself and gotten out of the way of any such car had it been sent up while he was there. We will notice these in order.

There was testimony tending to show that Carpenter directed respondent to go up and tighten the chain while it was running; that respondent got on the rear end of one of the cars and rode up the incline, stepping off at the summit and proceeded to his work; that Carpenter saw him go up; that Carpenter then had charge of the starting of the cars, and very soon thereafter sent up another car; that respondent was struck by this car and thrown from the structure, falling through the framework to the ground; that a man while at work tightening the chain, even if he were looking in the direction of an approaching car, could not see it until within thirty feet of him; that the car would travel that distance in about four seconds, it being admitted that the car would travel up the whole length of the incline in 24 seconds; that it was not the practice to send cars up while a man was there tightening the chain, and that it would be very dangerous to do so. Respondent testified that just before he went up Carpenter said to him, "I will take care of you while you are up there." There was sharp conflict in the testimony touching these facts, but we think the evidence was sufficient to present a question of fact for the jury to determine as to the appellants' negligence, and unless we can determine as a matter of law that appellants were relieved from liability by respondent's contributory negligence, we cannot disturb the verdict and judgment.

In view of the facts, which must have been believed by the jury as showing appellants' negligence, it is not easy to see how respondent could, by any lack of attention to the car, contribute to his own injury so as to relieve appellants from liability. The theory of appellants is that there is a safe manner of doing the work, while respondent chose an unsafe manner of doing it. It was admitted by respondent that in

turning the set screws he stood astride the chain trough, which is twelve inches wide, with his feet on the framework some fifteen inches below, and that he reached down with his wrench to the set screws, first on one side of the chain trough and then on the other, thus placing his back to the approaching car; hence, he did not see it until it was practically upon him; and it seems the noise of the machinery prevented his hearing it. There is evidence tending to show that he could have stood facing the chain with his side to the approaching car, first on one side of the chain and then on the other, in which position it is contended he could have seen the approaching car in time to extricate himself. This, it is urged, was the safe manner of doing the work. We think the evidence was such that the jury might well believe that even had he proceeded to the tightening of the chain in this manner, still he would not in his necessarily stooping position with his attention upon his work be likely to see an approaching car in time to enable him to safely get out of its way. Considering the evidence as to the short distance from where he was at work to where the car could be first seen, and the very short time it would take the car to traverse that distance, the jury were justified in believing that he was in a very dangerous position even if he actually saw the car at the farthest point it could be seen from him.

There was some evidence tending to show that when a car was attached to the chain at the foot of the incline it caused a jerk upon the chain which would be noticed at the point where respondent started to work, from which it was argued that, had he been exercising due caution, such jerk would have furnished him warning that a car was coming up the incline. The evidence as to this effect upon the chain by the attaching of a car thereto, especially the effect upon the chain at the upper sprocket, we think was not so convincing that the jury were bound to believe that it would have furnished such warning to respondent as is claimed; besides, it does not appear that respondent had actually reached the

set screws and commenced his work before the starting of the car which is claimed to have struck him. The evidence indicates that he was struck almost immediately after commencing his work. The jury might have believed that whatever jerk was caused by the attaching of the car to the chain in this instance occurred before respondent had an opportunity of noticing it. This we think was a question of fact for the jury, and we cannot say, as a matter of law, that respondent was guilty of contributory negligence.

There was evidence tending to show that one of the dangers incident to standing astride of the chain trough and reaching down to the set screws was the possibility of a person so doing having his clothing caught on the dogs of the running chain. Counsel argued that this evidence was so conclusive that the court could, as a matter of law, say defendant chose a dangerous way of doing the work when a safe way was available to him. Since the jury must have found that respondent's injury did not result from this danger, it becomes immaterial whether respondent carelessly exposed himself to it or not.

While the trial judge was defining the issues, at the beginning of his instructions to the jury, he stated: "He (plaintiff) alleges that before this accident, he was able to earn and could earn $4 per day as a compensation; that he was twenty-four years of age at the time of this accident and thereby in law would have an expectancy of life of thirty-nine years." This statement to the jury is claimed to be erroneous and prejudicial, since there was no allegation in the complaint as to what respondent's expectancy of life was, nor was there any evidence introduced so showing. It will be noticed that this instruction was only purporting to state what the issues were, although counsel argues to some extent as though it was an instruction binding upon the jury as to what the life expectancy of the plaintiff actually was. We think it clear that it is not subject to that objection. It was, however, technically erroneous as to respondent's alleging that he

had "An expectancy of life of thirty-nine years." No further reference to respondent's expectancy was made in the instructions. We are of the opinion that this technical error is not sufficient to require reversal of the judgment.

In certain instructions given by the court, touching certain facts which there was evidence tending to show, the court commenced one with the expression, "If you find from the evidence that the defendant Carpenter" etc., and commenced another with the expression, "Further, Gentlemen, should you believe from all the evidence that the defendant Carpenter" etc. It is contended that each of these instructions is a misstatement of the law and in violation of the rule requiring all material facts to be established by the person upon whom the burden rests, by a fair preponderance of evidence. In other words, that these introductory remarks ignore that rule. Prior to the giving of these instructions the court had instructed the jury as to the burden of proof, that the burden was upon the plaintiff to establish the material allegations of his complaint, which were denied, by a fair preponderance of evidence, and then proceeded to give a fair legal definition of what is meant by preponderance of evidence. We think it unnecessary to introduce each instruction, such as here complained of, by formal words indicating that the special facts referred to must be proven by a preponderance of evidence. Such is clearly to be inferred after the giving of a general instruction by the court upon that subject.

The court instructed the jury, in substance, that if they should find that it was not the customary practice to send up a car when a person was tightening the chain, and that it was dangerous to such person to do so, it was then the duty of Carpenter, if he knew respondent was at work tightening the chain, to see that no car was sent up until Carpenter knew that respondent was no longer in a position of danger. It is contended that there was no evidence upon which this in-

struction could be based. There was evidence of two witnesses, both of whom had worked around the railway for some considerable time and were familiar with the manner of its operation, that they had never known of a car being sent up while a person was tightening the chain. Respondent testified in substance the same. There was no witness who testified to the contrary. It is true there was no direct evidence of a general custom, but we think, in view of the evidence and the apparent dangers of sending a car up while a man was there tightening the chain, this instruction was not erroneous. In other words, the jury might well believe from this evidence and the general situation showing the danger of such a course, that it was the custom and understood by respondent and other employees, that cars were not sent up while the chain was being tightened.

Counsel for appellants have assigned many errors other than those we have discussed. A very large proportion of them are based upon rulings of the trial court to which no exceptions were taken. Other alleged errors were cured by matters occurring at the trial, and the others are so clearly without merit that we do not feel called upon to discuss them. We are of the opinion that the case was fairly tried. We find no error in the record. The judgment is affirmed.

RUDKIN, C. J., MOUNT, DUNBAR, and CROW, JJ., concur.

[No. 8475. Department Two. March 25, 1910.]

# THE STATE OF WASHINGTON, *Respondent*, v. L. DECHMANN, *Appellant*.[1]

PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—INFORMATION—SUFFICIENCY. An information charging the practicing of medicine without a license, in the language of the statute, is sufficient without setting forth requirements for obtaining the license which are not made a part of the substantive crime, and without pleading matters made by the statute *prima facie* evidence of the fact that the accused had no license.

SAME—LICENSE—FILING—RESIDENCE OF DEFENDANT—FAILURE OF PROOF. In a prosecution for practicing medicine without a state license filed of record in the county of defendant's residence, there is a failure of proof where the state fails to show the residence of the defendant, although it was shown that he practiced medicine in the county charged without any license filed in such county.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 1, 1909, upon a trial and conviction of the crime of practicing medicine without a license. Reversed.

*Million & Houser* and *George Friend*, for appellant.

DUNBAR, J.—On March 1, 1909, the state of Washington, by and through George F. Vanderveer, prosecuting attorney in and for the county of King, filed its information against the appellant, the charging part of which is as follows:

"He, said L. Dechmann, in the county of King, state of Washington, on the 7th day of July, A. D. 1908, did then and there wilfully and unlawfully practice medicine without a license, in that he, said L. Dechmann, did then and there wilfully and unlawfully, for a fee, prescribe, direct and recommend for the use of one George A. Morton, certain drugs and medicines for the treatment, care and relief of certain bodily infirmities and disease of said George A. Morton, and did then and there wilfully and unlawfully assume the title of doctor, without first having obtained from the state medical

[1]Reported in 107 Pac. 858.

examining board of the state of Washington a license therefor as required by law, and without having filed such license or a certified copy thereof with the county clerk of said King county, state of Washington, said L. Dechmann not having registered in the office of the auditor of said King county as a practitioner of medicine or surgery as provided for by chapter CLXIX of the code of Washington (1881) and the acts amendatory thereof, and not having on said 7th day of July, A. D. 1908, or prior thereto, filed in the office of the auditor or of the clerk of said King county any copy or any transcript of any such registration in any other county than said King county in said state of Washington."

A demurrer was interposed to this information, which was overruled; the cause went to trial, and a verdict was rendered in the case. Judgment was entered and appeal followed.

This is another of those oft-recurring cases where the state is not represented by the prosecuting officers. We think the demurrer was properly overruled. While all the evidentiary provisions of the law are not set forth in the information, it does charge defendant in plain language with wilfully and unlawfully practicing medicine without a license, in King county, in the state of Washington. The statute provides, Laws 1901, p. 47, § 3, that:

"Any person practicing medicine or surgery or either of its or their branches within this state without first having obtained, and filed the license provided for in this act, or contrary to the provisions of this act, shall be deemed guilty of a misdemeanor," etc.

It is true that the statute proceeds to set forth a great many requirements, but they are in no way connected with, or made a part of, the substantive crime charged, viz., practicing medicine without a license. But as we have said before, and as is stated in plain words in the statute itself, following the language just above quoted:

"In all prosecutions under the provisions of this act, evidence that the defendant has failed to file a license with the county clerk as herein required, shall be *prima facie* evidence

that the defendant is not a legally licensed practitioner." Laws 1901, p. 47, § 3.

Provisions follow which are simple rules of evidence and in no sense a part of the crime.

But we think there was such a failure of proof in this case as will necessitate a reversal of the judgment. There was proof that the defendant had practiced medicine in King county, and that he had treated one George A. Morton, mentioned in the information. There was also proof that no license had been filed in King county. But there was no substantial proof, upon which a judgment could be based, that the defendant was a resident of King county at the time of this alleged treatment of Morton, viz., on the 7th day of July, A. D. 1909; and, under the law, the failure to file the license in a county other than the county in which the defendant resides would not be proof of the violation of the law or the commission of the crime charged, because it is not one of the requirements of the statute that the practitioner should file the license in counties other than the one where he resides, even though he might be called to another county for the purpose of practicing his profession temporarily. It would seem that it would have been an easy matter, if such were the fact, to prove by direct and convincing testimony that the defendant was a resident of King county on the 7th day of July, 1909; but such testimony was not produced, and all the positive testimony that there is in the record is to the effect that, at that particular time, the defendant was a resident of Snohomish county.

For this reason the judgment will be reversed, and the court instructed to grant appellant's challenge to the sufficiency of the evidence.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8220. Department Two. March 25, 1910.]

SNOHOMISH RIVER BOOM COMPANY, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY, *Appellant*.[1]

APPEAL—REVIEW—FINDINGS—EXCEPTIONS. One general exception to specific findings of fact and conclusion is not sufficient to secure a review of the evidence.

CONTRACTS—CONSIDERATION—FORBEARANCE. Forbearance of a threatened suit to enjoin certain work, is a sufficient consideration for a promise to pay all damages resulting from the work, where the claim was disputed and doubtful, although there was no liability for the damages.

APPEAL—REVIEW—PLEADINGS—WAIVER OF ERROR. Where issues were made up without demurrer to the complaint, and the facts proved warranted the findings, a demurrer *ore tenus* at the trial is unavailing to secure a reversal for insufficiency of the complaint.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered February 13, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for damages. Affirmed.

*F. V. Brown* and *Frederic G. Dorety*, for appellant.

*Cooley & Horan*, for respondent.

MOUNT, J.—The respondent brought this action to recover the sum of $1,987.97, as compensation for expenses incurred in handling logs and reconstructing a logging boom, made necessary by the building of a new bridge by the defendant. This bridge was constructed across the plaintiff's boom, and interfered therewith. The action was tried to the court without a jury, findings of fact were made, and a judgment was entered in favor of the plaintiff for $1,871,75. The defendant has appealed.

The court made findings which were separately stated and numbered, and were to the effect that the plaintiff was a cor-

[1]Reported in 107 Pac. 848.

poration engaging in catching, booming, and rafting logs in Steamboat slough, one of the channels of the Snohomish river emptying into Puget Sound, in Snohomish county, and a part of the navigable waters of the United States; that the plaintiff has maintained such boom at the point where the defendant's bridge crosses said slough for more than eighteen years, in accordance with plans approved by the secretary of war of the United States and in conformity with its plat as filed with the secretary of state of Washington; that the defendant is a railway corporation doing business in this state; that in December, 1906, the defendant commenced construction of a steel railway bridge across said slough and over and across the plaintiff's boom; that the plans and the location of said bridge were approved by the secretary of war before the construction thereof was begun, and that the bridge was constructed in accordance with the map of location and plans, and that the piers, false work, and piling were provided for and necessary for carrying out of said plans; but that a line of dolphins placed within the limits of said boom of said plaintiff was not provided for in said plans or authorized by the permit issued by the secretary of war. Findings number 5 and 6 are as follows:

"(5) That in the construction of said bridge the above named defendant, without the consent of and against the protest of said plaintiff and without any compensation having first been made or paid into court for said plaintiff, erected and placed in said river and across said boom, false work supporting said bridge, consisting of piles driven in the bed of said stream, which completely closed said boom excepting for a gap about fourteen feet wide left therein, and that for the purpose of deflecting the logs coming down said stream and into said boom through said false work the said defendant drove a line of dolphins above said bridge and laid a line of boom sticks to deflect said logs and timber products coming into said boom through said gap in said false work, and that thereafter and as a part of said bridge the said defendant erected in the bed of said stream at a point about the center

of plaintiff's boom a permanent pier, for the purpose of carrying said bridge.

"(6) That shortly after the aforesaid work was commenced by said defendant, the plaintiff protested to said defendant and threatened to commence proceedings to enjoin the doing of said work and the construction of said bridge upon account of the injury and damage which it sustained by reason thereof, and that said defendant promised and agreed to pay said plaintiff all damages which it might suffer by reason of the construction of said bridge, including the cost of the additional labor for the sluicing of the logs through said false work, and after the completion of said bridge to remove said false work and the aforesaid dolphins and reconstruct the boom of said plaintiff in as safe and efficient a manner as it was at the time of the commencement of the work upon said bridge."

The findings then recited that the plaintiff, by reason of the said construction of the bridge, was required to employ additional labor, amounting to the sum of $2,425.50, in order to run logs through the said false work; that after the construction of the bridge, the defendant neglected to remove certain false work, and thereby rendered it impracticable for plaintiff to handle logs and timber through the said boom; that the defendant failed and neglected to reconstruct the boom, and that thereafter the plaintiff was required to, and did, reconstruct said boom and remove certain dolphins; that in the reconstruction of the boom, plaintiff expended the sum of $1,566.22, but that the boom as reconstructed was stronger and a better boom than the old one; that the reasonable cost of constructing the new boom as efficient as the old was $950; that the defendant paid to the plaintiff the sum of $2,003.75, being for labor employed by the plaintiff in rafting logs through the false work of said bridge, but failed and neglected to pay the balance thereof, and that the total damage suffered by the plaintiff by reason of the construction of the bridge, after deducting the amount paid by the defendant, was the sum of $1,371.75. The conclusion of law was to the effect that the plaintiff recover that

sum from the defendant. The exception to these findings was as follows: "To all of which finding and conclusions the defendant by its attorneys duly excepted, and such exception was allowed."

We have frequently held that a general exception of this kind is not sufficient, and the evidence will not be reviewed to determine the correctness of findings not excepted to specifically. *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815; *Smith v. Glenn*, 40 Wash. 262, 82 Pac. 605; *Horrell v. California etc. Ass'n*, 40 Wash. 531, 82 Pac. 889; *Crowe & Co. v. Brandt*, 50 Wash. 499, 97 Pac. 503. In *Peters v. Lewis*, *supra*, we said:

"It has been often held by this court that such exceptions are too general to constitute the exceptions required by law. When the court makes findings, and these are separately stated, numbered, and entered, specific exceptions thereto must be taken in order that the court may know what ones are claimed to be erroneous, and upon what particular points it is desired that the evidence shall be reviewed. *Hannegan v. Roth*, 12 Wash. 65, 40 Pac. 636; *Cook v. Tibbals*, 12 Wash. 207, 40 Pac. 935; *Fremont Milling Co. v. Denny*, 12 Wash. 251, 40 Pac. 1062; *Ballard v. Keane*, 13 Wash. 201, 43 Pac. 27. Such general exceptions are, therefore, the equivalent of no exceptions. When no exceptions have been taken to the findings as entered by the court, the evidence will not be reviewed on appeal. *Montesano v. Blair*, 12 Wash. 188, 40 Pac. 731; *Stoddard v. Seattle Nat. Bank*, 12 Wash. 658, 40 Pac. 730."

The findings in this cause must therefore be taken as correct.

It appears from finding No. 6, above quoted, that the respondent threatened to enjoin the construction of the bridge, and that the appellant promised and agreed to pay the cost of sluicing logs through the false work before completion of the bridge, and after completion thereof, to remove the false work and reconstruct the boom so that it would be as safe and efficient as it was prior to the beginning of work on the bridge. It is argued by the appellant that the obstruction to navigation, even if injurious to the respondent, was

*damnum absque injuria*, by reason of the permission granted by the secretary of war for the construction of the bridge across navigable waters of the United States. It is also argued that, if there was an agreement to pay damages, such agreement was without consideration. We need not consider whether there was any actual legal liability for damage done to the respondent's boom. It is apparent that the respondent claimed a liability, and that the appellant conceded there was some liability, for it actually paid $2,003.75 of the expenses in sluicing logs through the false work. If the claim of the respondent was disputed and doubtful, and suit was threatened, the waiver of the claim or of the right to suit was a sufficient consideration for the contract. *Hutchinson v. Mount Vernon Water & Power Co.*, 49 Wash. 469, 95 Pac. 1023. The contract, having been made in good faith, for sufficient consideration, and acted upon, will therefore be enforced.

It is claimed that the complaint does not state a cause of action. No demurrer was filed to the complaint; but, after the issues were made and the cause came on for trial, an oral general demurrer was interposed and an objection to the introduction of any evidence was made and overruled. Under the rule stated in *Peterson v. Barry*, 50 Wash. 361, 97 Pac. 239, and cases there referred to, these objections cannot avail where, after trial, the facts are sufficient to justify a recovery.

A forcible argument is also made as to the justness of the amount of recovery; but in view of the fact that no specific exceptions were taken to these findings, we are not at liberty to review them.

The judgment must be affirmed, and it is so ordered.

RUDKIN, C. J., PARKER, DUNBAR, and CROW, JJ., concur.

[No. 8381. Department One. January 21, 1910.]

EDWIN HOWARD *et al.*, *Appellants*, v. THE CITY OF TACOMA *et al.*, *Respondents*.[1]

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 11, 1909. Affirmed.

*Boyle, Warburton & Brockway*, for appellants.

*T. L. Stiles, Frank R. Baker*, and *F. A. Latcham*, for respondent City of Tacoma.

*H. H. Field* and *Geo. W. Korte*, for respondent Chicago, Milwaukee & St. Paul R. Co.

PER CURIAM.—This case, except that a different piece of land is involved, is almost identical in its facts with, and is governed by the rule announced in *Ettor v. Tacoma*, *ante* p. 50, 106 Pac. 478. Upon the authority of that case, the judgment of the lower court is affirmed.

ON PETITION FOR REHEARING.[2]

[Decided March 26, 1910.]

PER CURIAM.—The petition for rehearing in this case is denied on the authority of the decision this day filed in the case of *Ettor v. Tacoma*, *ante* p. 50, 107 Pac. 1061.

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[No. 8284. Department One. February 4, 1910.]

JOE SCHLUMPF, *Appellant*, v. J. L. KAHALEY, *Respondent*.[3]

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 22, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to recover the value of personal property. Affirmed.

*Hughes, McMicken, Dovell & Ramsey* and *E. C. Hanford*, for appellant.

*Richard Saxe Jones*, for respondent.

PER CURIAM.—Action to recover the value of two cases of cigars, shipped from Tampa, Florida, to Seattle and consigned to appellant.

[1]Reported in 106 Pac. 481.

[2]Reported in 107 Pac. 1064.

[3]Reported in 106 Pac. 1135.

The respondent is a drayman and, upon the arrival of the cigars at Seattle, he obtained the cases from the railway company for delivery to appellant. Plaintiff, claiming not to have received the cigars, brought the action, and the court below, finding delivery had been made, gave judgment in favor of defendant, and plaintiff appeals.

The only error assigned is that the evidence does not support the findings of fact. This assignment of error necessitated a careful reading of the evidence and, after having done so, we find ample testimony to sustain the findings. It would serve no good purpose, and would only add unnecessary length to this opinion, to recite the evidence here. It is sufficient to say that the court below was justified by the evidence in the record in making its findings of fact and conclusions of law, and entered the proper judgment thereon.

The judgment is sustained.

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[No. 7605. *En Banc.* February 11, 1910.]

JOSEPH WEST *et al.*, *Plaintiffs and Appellants*, v. L. B. CARTER *et al.*, *Defendants and Appellants.*[1]

Cross-appeals from a judgment of the superior court for San Juan county, Joiner, J., entered January 8, 1908, upon findings of the court, after a trial without a jury, awarding damages to the plaintiffs for false representations upon the sale of land. Reversed upon plaintiff's appeal.

*Frederick R. Burch* and *John A. Saboe*, for plaintiffs.

*T. D. J. Healy* and *J. J. Noethe*, for defendants.

ON REHEARING.

PER CURIAM.—After listening to the argument on rehearing which was granted in this case, the majority of the court are not inclined to disturb the decision heretofore rendered upon the original hearing, in an opinion filed July 17, 1909, *West v. Carter*, 54 Wash. 236, 103 Pac. 21.

[1]Reported in 106 Pac. 900.

[No. 8313. *En Banc.* March 24, 1910.]

THE STATE OF WASHINGTON, *on the Relation of the Puget Sound Realty Associates, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent.*[1]

Application for a writ of certiorari to review an order of the superior court for King county, Gay, J., entered September 20, 1909. Denied.

*Shank & Smith* and *Hughes, McMicken, Dovell & Ramsey*, for relator.

*Charles E. Shepard* and *W. H. Bissell Thomas*, for respondent.

PER CURIAM.—The question involved in this application is the same as that involved in the case of *State ex rel. Seattle General Contract Co. v. Superior Court*, 56 Wash. 649, 106 Pac. 150, where this court held that certiorari would not lie to review an order made in a cause directing an inspection of documents in the possession of an opposing party. Relator's application is therefore denied.

[1]Reported in 107 Pac. 833.

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1. ADVERSE POSSESSION — ESTOPPEL TO ASSERT — LACHES — EASEMENTS—ABANDONMENT. The plaintiff in ejectment, owner of the

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dominant estate, cannot recover land granted for a logging road or defeat the easement by reason of the fact that the rails were taken up and the right of way not used for the statutory period of ten years, where it appears that there was no intent to permanently abandon the easement, and that plaintiff had notice of the rehabilitating of the road, assisted in hauling the rails, arranged for gates at crossings, and for several years stood by while the railroad was rebuilt without objection or demand for possession. *McAdam v. Benson Logging & Lumbering Co*..... 407

2. ADVERSE POSSESSION—SCHOOL LANDS—HELD IN TRUST—LIMITATIONS—HIGHWAYS—PRESCRIPTION AGAINST STATE—GRANTS—EFFECT. Under the enabling act and the constitution providing that all lands granted to the state for educational purposes shall be held in trust for all the people and sold or disposed of only at public auction for the full market value, lands donated to the late territory for a university site cannot be acquired from the state by adverse possession, notwithstanding a provision that statutes of limitations generally shall run against the state, where the donors, in subsequently authorizing the regents to sell the lands in the interests of the university, and the legislature in accepting, imposed restrictions not materially different from those of the enabling act and the constitution; since the state accepted the trust and covenanted with the donors to apply the land to certain uses only, and no title can be acquired by adverse possession against the state in the absence of a provision making the state subject to the limitation. *State v. Seattle* ..... 602

AFFIDAVITS:

As part of record on appeal, see APPEAL AND ERROR, 16, 17.

AFTER-ACQUIRED TITLE:

Passing under deed, see DEEDS, 1.
Burden of proof, see EJECTMENT.
Passing by mortgage, see MORTGAGES, 6.

AGENCY:

See PRINCIPAL AND AGENT.

ALIENS:

Defenses in ejectment, see EJECTMENT, 2.

ALTERATION OF INSTRUMENTS:

As bar to rescission, see VENDOR AND PURCHASER, 19.

1. ALTERATION OF INSTRUMENTS—INSTRUCTIONS—MATERIALITY. Upon an issue as to whether material alterations were made in a contract for the sale of land, an instruction assuming that the alteration would be material if made without consent of the vendee does not

ALTERATION OF INSTRUMENTS—CONTINUED.

submit the materiality of the alteration to the jury. *Heinemann v. Sullivan* ..... 346

2. SAME. Upon an issue as to whether material alterations were made in a contract for the sale of land, an instruction authorizing the jury to find for the defendant if the plaintiffs signed the contract with alterations "making a deviation in a material matter," is not objectionable as submitting the question of alterations, which were admitted, where there was evidence to support the contention that the alterations were made upon the authority of the defendant, the contest being upon the question of such assent. *Heinemann v. Sullivan* ..... 346

3. SAME. Upon a contest as to whether the vendee consented to alterations in a contract for the sale of land, an instruction to the effect that the vendee would not be liable if material alterations were made, unless the matters inserted were part of the original agreement is not so broad as to inform the jury that the vendors had a right to alter a written contract to conform to a previous oral agreement without the consent of the vendee. *Heinemann v. Sullivan* 346

4. ALTERATION OF INSTRUMENTS—PROMISSORY NOTE—CONTRADICTORY DATES—ALTERATION—MATERIALITY. Where a promissory note, due one year after, was executed October 24th, 1902, but by mistake in filling a printed blank the date was written as 1892, a statement plainly written in ink that the note was due October 24th, 1903, contradicts and controls the printed date line; hence it was not a material alteration for the payee to change the printed figures of the date line to 1902. *Lombardo v. Lombardini*..... 352

**ANIMALS:**

Carriage of live stock, see CARRIERS.

**ANNULMENT:**

Of marriage, see MARRIAGE.

**APPEAL AND ERROR:**

From order of Railroad Commission, see CARRIERS, 6.
Criminal appeals, see CRIMINAL LAW, 3, 4.
Condemnation proceedings, see EMINENT DOMAIN, 13, 20-22.
Waiver of error, see HUSBAND AND WIFE, 10.
Review of special assessments, see MUNICIPAL CORPORATIONS, 14, 15.
Review, amendments, see TRIAL, 2.
Harmless error in rulings on evidence, see TRIAL, 3.
Record, presumptions, see TRIAL, 4.
Arguments and conduct of counsel, see TRIAL, 12-14.

III. DECISIONS REVIEWABLE.

1. APPEAL—APPEALABLE ORDERS — FINALITY — SUBSTANTIAL RIGHTS. An order refusing to quash a peremptory writ of mandamus, pre-

APPEAL AND ERROR—CONTINUED.

maturely entered upon findings, etc., without a formal judgment, is appealable as an order affecting a substantial right which in effect determines the action. *State ex rel. Billings v. Lamprey*..... 84

2. APPEAL—ORDERS APPEALABLE—FINALITY—STIPULATIONS—RIGHT TO APPEAL. An appeal from an order denying a temporary injunction will not be dismissed where the parties stipulated that it should be considered as a final order for the purposes of the appeal. *Allen & Nelson Mill Co. v. Vaughn*..... 163

3. APPEAL—DECISIONS REVIEWABLE—VACATION OF JUDGMENT — NEW TRIAL. An order refusing to vacate a judgment and grant a new trial is not appealable. *Lefever v. Blattner*..... 637

IV. RIGHT TO APPEAL.

4. APPEAL—PARTIES ENTITLED TO APPEAL—RECEIVERS. A receiver representing creditors, and defending an action to foreclose a chattel mortgage on the property, is entitled to appeal from the judgment. *Pickering v. Richardson*..... 117

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

5. APPEAL—REVIEW—EVIDENCE—WAIVER OF OBJECTION. Error cannot be predicated upon the refusal to strike out evidence outside the issues, when it was admitted without objection. *Falldin v. Seattle* ..... 307

6. APPEAL—REVIEW—PLEADINGS—WAIVER OF ERROR. Where issues were made up without demurrer to the complaint, and the facts proved warranted the findings, a demurrer *ore tenus* at the trial is unavailing to secure a reversal for insufficiency of the complaint. *Snohomish River Boom Co. v. Great Northern R. Co*..... 693

7. APPEAL—REVIEW—VERDICT—EVIDENCE. An objection that a verdict is not sustained by competent evidence cannot be urged where the record thereof is unintelligible by reason of illustrative references to a map which the witness was evidently indicating. *Kincaid v. Walla Walla Valley Traction Co*..... 334

8. APPEAL—REVIEW—FINDINGS—EXCEPTIONS. Findings of a referee which are not excepted to import verity. *In re Commercial Bank of Snohomish County*..... 381

9. APPEAL—REVIEW—EXCEPTIONS. Findings not excepted to are binding. *Craver v. Mossbach*..... 662

10. APPEAL—REQUISITES—EXCEPTIONS. Error cannot be predicated upon rulings of the trial court to which no exceptions were taken. *Wiemann v. Jackman R. Co*..... 682

11. APPEAL—REVIEW—FINDINGS—EXCEPTIONS. One general exception to specific findings of fact and conclusions is not sufficient to secure

APPEAL AND ERROR—CONTINUED.

a review of the evidence. *Snohomish River Boom Co. v. Great Northern R. Co*..... 693

VI. PARTIES.

12. APPEAL—PROCEEDINGS FOR TRANSFER—NOTICE—NECESSARY PARTIES. Upon appeal by heirs from an order of final distribution allowing an administrator's account, other heirs not joining in the appeal, who appeared at the hearing and filed exceptions to the account, are necessary parties upon whom notice of appeal must be served or the appeal will be dismissed, under Rem. & Bal. Code, § 1720. *Beckman v. Brommer*..... 436

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

13. APPEAL—NOTICE OF APPEAL—ORAL—TIME FOR TAKING. Under Rem. & Bal. Code, § 1719, authorizing an oral notice of appeal in open court at the time judgment is rendered, an oral notice given April 22d, at the time of overruling a motion for new trial, is ineffectual as an appeal from the judgment entered March 1st. *Lefever v. Blattner* ..... 637

14. APPEAL—BOND—FORM AND AMOUNT—DISMISSAL. An appeal bond, insufficient as a supersedeas bond, is not ground for dismissal of the appeal, where it was not conditioned to operate as an appeal and a supersedeas, and no attempt was made to stay the judgment, although it contained some language ordinarily used in a supersedeas bond, which was surplusage and of no evident intent or value. *Bridge v. Calhoun, Denny & Ewing*..... 272

X. RECORD AND PROCEEDINGS NOT IN RECORD.

15. APPEAL—RECORD—NECESSITY OF FINAL JUDGMENT—DISMISSAL. An appeal will be dismissed as presenting no issues, where the appellant states that findings were made, no exceptions thereto appear in the record, and the record fails to show the findings or the final judgment. *Yatsuyanagi v. Shimamura*..... 42

16. APPEAL AND ERROR—RECORD—AFFIDAVITS—NEW TRIAL. Error in refusing a new trial for newly discovered evidence will not be reviewed where the affidavits used on the application are not brought up by a bill of exceptions or statement of facts. *Haines & Spencer v. Kelley* ..... 219

17. APPEAL—RECORD—AFFIDAVITS. The dismissal of an action for want of prosecution, heard upon affidavits, cannot be reviewed on appeal where the affidavits are not brought up by a statement of facts. *Rehmke v. Fogarty*..... 412

18. APPEAL—STATEMENT OF FACTS—TIME FOR. Where a motion for a new trial is seasonably made the time for taking an appeal or filing a statement of facts does not begin to run until the motion is denied. *O'Brien v. American Casualty Co*..... 598

APPEAL AND ERROR—CONTINUED.

XV. HEARING AND REHEARING.

19. APPEAL—REHEARING—NEW QUESTIONS. A rehearing will not be granted to consider a new question not involved on the original hearing or even referred to in the brief on appeal. *King v. Upper* ..... 130

XVI. REVIEW.

20. APPEAL—REVIEW—SCOPE OF REVIEW. Upon an appeal from a decree merely determining the title to land in controversy, the supreme court will not consider questions that may arise upon a partition of the land. *Horton v. Barto*..... 477

21. APPEAL—REVIEW—ERRORS CONSIDERED—CORRECT DECISION BASED ON ERRONEOUS GROUND. Upon an assignment of error in rejecting an offer of proof, which was not broad enough in some particulars, error of the court in rejecting the offer upon another specific ground will be reviewed on appeal, where any change in the form of the offer would have been unavailing to appellant. *State v. Mays*.. 540

22. APPEAL—REVIEW—RIGHT TO ALLEGE ERROR—CROSS-APPEAL—NECESSITY. In the absence of a cross-appeal, the respondent cannot complain of the action of the lower court in denying its prayer for specific performance, and thereby obtain, on the adverse party's appeal, a more favorable judgment than it obtained below. *Koschnitzky v. Hammond Lumber Co*..... 320

23. APPEAL—REVIEW—FINDINGS—CONFLICTING EVIDENCE. Findings will not be disturbed where there was a close question of fact, decided upon oral evidence. *Fidelity and Deposit Co. v. Oliver*..... 31

24. APPEAL—REVIEW—VERDICTS. A verdict upon conflicting evidence will not be disturbed on appeal if there was sufficient testimony for legal consideration by the jury. *Cedar Rapids Nat. Bank v. Mhyre Brothers* ..... 596

25. SAME. The verdict of a jury sustained by competent evidence will not be set aside because the appellate court might have reached a different conclusion. *Kincaid v. Walla Walla Valley Traction Co.* ..... 334

26. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. In an action tried by the court without a jury, the admission of erroneous evidence is harmless, where the lower court doubted its admissibility and there was other competent evidence to establish the fact. *Williams v. Hewitt* ..... 62

27. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—OPINIONS. In an action for personal injuries sustained upon a defective sidewalk, after a witness for plaintiff has been asked upon cross-examination whether a person exercising ordinary care could have observed the defect, it is not prejudicial error to allow plaintiff's counsel to ask whether the plaintiff was walking in the ordinary manner, if the

APPEAL AND ERROR—CONTINUED.

answer did not express any opinion as to plaintiff's contributory negligence. *Hase v. Seattle* ..... 230

28. APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. Error in excluding evidence is cured where it was subsequently admitted. *Brown v. Seattle* ..... 314

29. APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. Error in overruling objections to improper questions calling for the witness' suspicions and beliefs is not prejudicial when the answers elicited merely related to competent and relevant facts and circumstances. *State v. Poyner* ..... 489

30. APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. Error cannot be predicated upon an improper statement of a witness, struck out on motion of the appellant, where no prejudice appears. *Anderson v. Globe Navigation Co* ..... 502

31. APPEAL—REVIEW—HARMLESS ERROR — EVIDENCE — CONCLUSION OF WITNESS. Where attorneys had testified to all that was said and done upon the execution of certain deeds in the way of explaining their effect to the grantors, who they testified apparently had a perfect understanding of the transaction, it is not error to exclude further questions as to whether they "explained the nature and character of the transaction"; since the question had already been answered and was objectionable as calling for a conclusion. *Sanpere v. Sanpair* ..... 524

32. APPEAL—REVIEW—HARMLESS ERROR—NEW TRIAL. Where a cause is heard *de novo* on appeal, irregularity in hearing a motion for a new trial outside of the county wherein the cause is tried is without prejudice, if the new trial was properly denied. *Shaw v. Spencer* 587

33. APPEAL—REVIEW—TRIAL—INSTRUCTIONS. It is not prejudicial to preface an instruction to the jury by the statement that it was given at the request of the appellant. *State v. Poyner* ..... 489

34. APPEAL—REVIEW—HARMLESS ERROR—NONSUIT—DEFECTS SUPPLIED. In an action of ejectment, error, if any, in refusing to direct a nonsuit for failure to prove that the defendant was in possession, is cured, where the defendant's testimony in his own behalf supplied the defect. *Gough v. Center* ..... 276

35. APPEAL—DECISION—LAW OF CASE—CONCLUSIVENESS. The facts and legal conclusions as found upon a former appeal are conclusive on the second appeal of a case. *Curry v. Wilson* ..... 509

**APPEARANCE:**

Entitles person to notice of appeal, see APPEAL AND ERROR, 12.

**APPLIANCES:**

Liability of employer for defects, see MASTER AND SERVANT, 7-9, 17.

**APPLICATION:**

For sale of tide lands, see PUBLIC LANDS, 6.
For trade-marks, see TRADE-MARKS.

**APPORTIONMENT:**

Of tax to co-owners, see TAXATION, 3-5.

**ARBITRATION AND AWARD:**

Reference of issues under order of court, see REFERENCE.

**ARGUMENT OF COUNSEL:**

In civil actions, see TRIAL, 12.

**ASSAULT AND BATTERY:**

Conviction of offense included in charge, see INDICTMENT AND INFORMATION.

**ASSESSMENT:**

Of compensation for property taken for public use, see EMINENT DOMAIN, 11.
For public improvements, see MUNICIPAL CORPORATIONS, 12-21.

**ASSIGNMENT:**

Of lease, see LANDLORD AND TENANT, 1.
Of mortgage or debt, see MORTGAGES, 3.
Of several causes of action, see SET-OFF AND COUNTERCLAIM.

**ASSUMPTION:**

Of risk by employee, see MASTER AND SERVANT, 15-19.

**ASSURANCE:**

By master of safety of place to work, see MASTER AND SERVANT, 5, 18.

**ATTORNEY AND CLIENT:**

Misconduct of counsel, see CRIMINAL LAW, 4.
Fees of attorney, see INDEMNITY, 3.
Attorney's fees on foreclosure of mortgage, see MORTGAGES, 1.
Argument or conduct of counsel at trial in civil actions, see TRIAL, 12-14.
Opinion of attorney as to law of another state, see TRIAL, 5.

1. ATTORNEY AND CLIENT — FEES — OFFSET—NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for attorney's services rendered to an estate, the defendant cannot offset the negligence of the plaintiff resulting in defendant's payment of an improper inheritance tax, where it appears from an inventory verified by the defendant that the tax was a proper charge against the state, and there was no evidence to the contrary except plaintiff's opinion, given to the defendant, that it was not a proper charge. *Conover v. Carpenter*. 146

2. ATTORNEY AND CLIENT—CONTROL OF LITIGATION—SETTLEMENT BY CLIENT. An agreement between the parties to an action for a

ATTORNEY AND CLIENT—CONTINUED.

dismissal, without costs, is effective as a settlement without a formal order of dismissal; since the parties may settle and satisfy the debt pending entry of the judgment. *Cline Piano Co. v. Sherwood*.. 239

3. ATTORNEY AND CLIENT—LIEN—JUDGMENT—ENTRY—NECESSITY. An attorney's lien on a judgment cannot attach upon the oral announcement of the decision at the conclusion of the trial, but a written judgment must be formally entered, under Rem. & Bal. Code, § 136, authorizing an attorney's lien upon a judgment rendered, to the extent of the value of his services in the action, "by the filing of a notice of lien to be entered on the execution docket." *Cline Piano Co. v. Sherwood*..... 239

4. ATTORNEY AND CLIENT—SETTLEMENT OF ACTION—FRAUD UPON ATTORNEY. A settlement of a pending action by the parties will not be set aside because it defeats an attorney's lien for services, where the evidence does not warrant a finding of collusion and fraud on the part of the parties, taking into consideration a counterclaim set up in good faith and the fact that the law favors settlements. *Cline Piano Co. v. Sherwood*..... 239

**AUTHORITY:**

Of broker, see BROKERS.
Of agent, see CORPORATIONS, 1.

**BAR:**

Of action by former adjudication, see JUDGMENT, 2-5.

**BENEFITS:**

As effecting compensation for appropriation of property, see EMINENT DOMAIN, 11.
Acceptance of as ground of estoppel, see ESTOPPEL, 5.
Assessment of benefits caused by construction of public improvements, see MUNICIPAL CORPORATIONS, 12-21.

**BIAS:**

Of juror, see JURY.

**BIDS:**

Contracts with municipality, see MUNICIPAL CORPORATIONS, 2.

**BILLS AND NOTES:**

Alteration, see ALTERATION OF INSTRUMENTS, 4.
Default as maturing whole debt, see MORTGAGES, 2.
Provisions for compounding interest as usurious, see USURY, 5.

1. BILLS AND NOTES—HOLDER IN GOOD FAITH—BURDEN OF PROOF. In an action upon a promissory note, defended on the ground of failure of consideration, breach of warranty and fraud in its inception, clearly established by the evidence, the burden of proof is upon the

BILLS AND NOTES—CONTINUED.

plaintiff to show that it is the holder in good faith, under Rem. & Bal. Code, § 3450, so providing as to a holder in due course, when it is shown that the title of the person who negotiated it is defective, and Id. § 3443, defining a holder in due course. *Cedar Rapids Nat. Bank v. Myhre Brothers* ..... 596

**BONA FIDE PURCHASER:**

Of bill or promissory note, see BILLS AND NOTES, 2-4.
Of lands, see VENDOR AND PURCHASER, 1-4.

**BONDS:**

On appeal, see APPEAL AND ERROR, 14.
Estoppel by recitals in, see ESTOPPEL, 6.
Of officers, see OFFICERS.
Principal and surety as party defendant, see PARTIES, 1, 3.

**BOOMS:**

See LOGS AND LOGGING.

**BOUNDARIES:**

Description of land in deeds, see DEEDS, 3, 4.
Burden of proof, see EJECTMENT, 1.
Judgment determining, see JUDGMENTS, 5.
Of tide lands, see PUBLIC LANDS, 3.

1. BOUNDARIES—DESCRIPTIONS—CALLS—COURSES AND DISTANCES. In a description in a deed in which a calculation of the north measurement of an irregular meander showed a total width of 1080 feet, while the south measurement called for a distance of 1020 feet, to the place of beginning, the end measurements control a call for parallel lines on the east and west sides of the tract, and such lines cannot be parallel. *Lundell v. Allen & Nelson Mill Co*..... 150

**BREACH:**

Of contract, see CONTRACTS, 3.
Of covenants, see COVENANTS.

**BROKERS:**

Consignment to, see SALES, 2.

1. BROKERS—CONTRACTS—COMPENSATION—CONSTRUCTION. A broker's contract to secure options on timber on certain lands for a commission of twenty per cent of the net profits derived from the sale of the timber, does not entitle him to commission on the profits of land which it was necessary to purchase in order to secure part of the timber; the contract contemplating only the purchase of timber to be removed from the land within a time specified. *Wilson v. James* ..... 143

2. BROKERS—COMMISSIONS—FAILURE OF TITLE—TRANSFER OF LEASE. A broker is not entitled to a commission for effecting a sale of a

BROKERS—CONTINUED.

leasehold where the contract of sale was provisional, being dependent upon securing the landlord's consent to the assignment of the lease or the execution of a new lease on terms refused by the landlord, and the contract of sale required a good title. *Merritt v. Lillyblade* ..... 159

3. BROKERS—COMMISSIONS—CONTRACTS. In an action to recover a broker's commission, under defendant's offer to sell and his promise in writing to pay the commission, the right to recovery is fixed by procuring a purchaser ready and willing to buy, followed by defendant's refusal to convey, and it is immaterial that the purchaser's written acceptance of the offer was conditional in form. *Hege, Hachez, Phillips & Co. v. Hessel*..... 499

4. BROKERS—COMMISSIONS—CONTRACTS—FRAUDS, STATUTE OF. No recovery can be had against a vendor upon his refusal to convey, for loss of a broker's commission agreed to be paid the vendee, where the vendor has not bound himself in writing to pay the commissions as required by the statute of frauds. *Hege, Hachez, Phillips & Co. v. Hessel* ..... 499

**BUILDING CONTRACTS:**

See CONTRACTS, 3, 4.
Liquidated damages, see DAMAGES, 2, 3.

**BURDEN OF PROOF:**

Bona fides of holder, see BILLS AND NOTES.
Injuries to live stock, see CARRIERS, 1.
As to title, see EJECTMENT.
In attack on judgment, see JUDGMENTS, 2.
Instructions as to, see TRIAL, 9.

**BURIAL GROUNDS:**

See CEMETERIES.

**CALLS:**

In deeds, see BOUNDARIES.

**CANCELLATION OF INSTRUMENTS:**

Rescission of contract of sale of land, see VENDOR AND PURCHASER, 7.

1. CANCELLATION OF INSTRUMENTS—DEEDS—VALIDITY—ASSENT—EVIDENCE—SUFFICIENCY. The evidence sustains findings that deeds and leases executed by an aged couple to their nephews were void and without the assent of the parties, where it appears that the grantors were French Canadians, unable to read or write the English language and had little comprehension of English or of the difference between wills, deeds, and leases; that they set out with the intention to make a will in favor of two nephews for one-third interest in their lands, with a ten-year lease in their favor; but upon de-

CANCELLATION OF INSTRUMENTS—CONTINUED.

ciding to will one-half to their daughter and one-fourth to the nephews, and with that intent, upon the advice of an attorney that the effect would be the same, they executed deeds for such interests, taking back life leases; and that upon learning of the consequence of their acts, they repudiated the transaction and refused to recognize the leases or accept a division of the crops thereunder. *Sanpere v. Sanpair*..... 524

**CANDIDATES:**

Certificates of, see ELECTIONS.

**CARRIERS:**

Pleading in action for injuries to live stock, see PLEADING, 3.

1. CARRIERS—OF LIVE STOCK—NEGLIGENCE—BURDEN OF PROOF. Where the shipper of live stock accompanies the same, the burden is upon him to prove negligence in transit resulting in injury to the stock. *Bartelt v. Oregon R. & Nav. Co*..... 16

2. SAME—CONTRACT—CONDITIONS—EXEMPTION FROM LIABILITY. The agreement of a shipper of live stock to unload, load, feed, water and care for the stock in transit, is binding upon him, but does not exempt the carrier from liability for any negligent act in transporting the stock; nor could it do so by contract. *Bartelt v. Oregon R. & Nav. Co*..... 16

3. SAME—NEGLIGENCE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence in the operation of a train, and that the same resulted in injury to live stock shipped thereon, where it appears that two car loads of young mares were properly loaded, the number in each car was consistent with proper handling, that they were unloaded and fed and reloaded in good condition at U., after which the cars were chugged and jammed nearly all the way, the conductor stating that the engine was overloaded, that the cars were jammed in switching, horses being thrown to the floor, and at the end of the journey one of them was found to have a dislocated shoulder, another a dislocated hip, and two had slipped their foals; although the evidence as to the rough handling of the train was conflicting. *Bartelt v. Oregon R. & Nav. Co*..... 16

4. SAME—NEGLIGENCE—EVIDENCE. The carrier of live stock accepting mares for shipment is chargeable with notice that they are heavy in foal. *Bartelt v. Oregon R. & Nav. Co*..... 16

5. CARRIERS—OF LIVE STOCK—ACTION FOR NEGLIGENCE—FORM—PLEADING—IMMATERIAL VARIANCE. A common law action against a carrier of live stock for negligent acts in the operation of the train resulting in injury to the stock is maintainable irrespective of the special contract of carriage; so that a variance as to the contract would be immaterial where the issue raised and tried was as to the negligence of the company in operating the train. *Bartelt v. Oregon R. & Nav. Co*..... 16

CARRIERS—CONTINUED.

6. CARRIERS—SWITCHING CHARGES—RATES—PRESUMPTIONS—APPEAL—REVIEW. An order of the railroad commission reducing switch charges, based largely upon an old rate that had been continued in force for some time, and upon conflicting evidence as to the time consumed in the service and as to the other services performed by the switching crew, is aided by the presumption that a rate continued in force for some time is presumed to be remunerative and by the presumption that the findings of the commission are correct; and the order will not be disturbed on appeal although the testimony is meager, indefinite, and unsatisfactory. *Northern Pac. R. Co. v. Railroad Commission* ..... 134

CATTLE:

Carriage of live stock, see CARRIERS.

CEMETERIES:

Implied dedication, see DEDICATION, 2.

1. CEMETERIES—ABANDONMENT—DEDICATION. A burial ground is not abandoned from the fact that no new interments were made for several years, where the dead interred are not exhumed and removed by those having authority to do so. *Roundtree v. Hutchinson*.... 414

2. CEMETERIES—DESECRATION—ACTIONS—PARTIES — INJUNCTION. The relatives of the dead interred in a burial ground, who sue on behalf of themselves and all others of the precinct, may maintain an action to enjoin the desecration of a burial ground impliedly dedicated to the public for use as such. *Roundtree v. Hutchinson*.. 414

CERTIFICATE:

Of nomination, see ELECTIONS.

CHARGE:

To jury in civil actions, see TRIAL, 6-11.

CHATTEL MORTGAGES:

Foreclosure, parties entitled to appeal, see APPEAL AND ERROR, 4.
Proceeds, disposition, see RECEIVERS, 2.

1. CHATTEL MORTGAGES—PRIORITIES—FUTURE ADVANCES. The lien of a senior chattel mortgage on a crop of wheat to secure certain enumerated notes, cannot be extended to cover advances subsequently made for seed, provisions, storage, and harvesting expenses, as against the lien of a junior mortgage, where the mortgage made no provision for future advances or for such items. *Inland Trading Co. v. Edgecombe*..... 257

2. CHATTEL MORTGAGES—PROCEEDS—ACCOUNTING—EXPENSE ITEMS ALLOWABLE. Upon an accounting for the proceeds of a crop of wheat delivered by the mortgagor to, and handled by, a usurious mortgagee, he must account for the net proceeds only; and freight, warehouse,

CHATTEL MORTGAGES—CONTINUED.

storage, and commission charges and expenses, incurred in handling and selling the grain, are properly chargeable against the proceeds; but the mortgagee is not entitled to charges for "insurance" not authorized by the mortgagor or junior mortgagee, nor for "interest" where there was no evidence to show upon what it was based. *Inland Trading Co. v. Edgecombe*..... 257

3. CHATTEL MORTGAGES—SALE OF PROPERTY—PRIORITIES. Where an understanding that a corporation was to purchase and pay for certain personal property, delivered to and used by it, was not carried out or completed until after the other party thereto had given a chattel mortgage thereon, there was at most but an executory contract of sale when the mortgage was given, and the completed sale was subject to the mortgage. *In re Commercial Bank of Snohomish County* ..... 381

4. CHATTEL MORTGAGES—FORECLOSURE—COSTS—KEEPING HORSES—USE—ACCOUNTING—EVIDENCE—SUFFICIENCY. A mortgagee in possession of the mortgaged property as custodian of the sheriff, who uses and works the same pending a contested foreclosure, is not entitled to be paid for care and keep anything more than the actual costs less what the property had earned, as shown by an accounting; and he impliedly admits the use of the property as alleged and fails to make the accounting contemplated by law, where, in answer to an affidavit that the property, twenty-five head of horses and farm machinery, had been worked and used by him upon his farm for his own use and benefit, and that the work and labor of the horses and the use of the machinery exceeded the cost of keeping and caring for the property, he merely filed a brief answering affidavit to the effect that it became necessary to employ a man to care for the horses and that the amount paid to him by the sheriff was actually expended incident to said care and keep over and above all offsets by reason of the value of the use of any of the stock and property; the sheriff making no showing except by an item in his expense bill of $2,902 paid for care and keep for 11½ months. *Edmonds v. Eubanks*..... 529

**CITIES:**

See MUNICIPAL CORPORATIONS.

**CIVIL SERVICE:**

Application to municipal agents and employees, see MUNICIPAL CORPORATIONS, 5.

**CLAIMS:**

Mining claims, see MINES AND MINERALS.

Against municipal corporation for injury in streets, notice of, see MUNICIPAL CORPORATIONS, 23-26.

**CLOUD ON TITLE:**

See QUIETING TITLE.

**COLLATERAL ATTACK:**

On judgment, see JUDGMENT, 2.
Probate of will, see WILLS, 1.

**COMMERCE:**

Carriage of goods and passengers, see CARRIERS.

**COMMISSIONS:**

Of broker, see BROKERS.

**COMMON CARRIERS:**

See CARRIERS.

**COMMON LAW:**

Dedication, see DEDICATION.

**COMMUNITY PROPERTY:**

Necessity for administration, see EXECUTORS AND ADMINISTRATORS, 2.
In general, see HUSBAND AND WIFE.

**COMPENSATION:**

Of attorney, see ATTORNEY AND CLIENT.
For property taken for public use, see EMINENT DOMAIN.

**COMPLAINT:**

By servant of defects in appliances, see MASTER AND SERVANT, 8, 9.

**COMPROMISE AND SETTLEMENT:**

Relinquishment of right or claim by release thereof, see RELEASE.
Of suit without consent of attorneys, see ATTORNEY AND CLIENT, 1, 4.

1. COMPROMISE AND SETTLEMENT—EVIDENCE—SUFFICIENCY. A release or waiver of claims sufficiently shows a settlement between the parties respecting lands jointly bought, one party having made advances for and taken a mortgage upon the interest of the other, where the release describes the land and recites that, in consideration of $250 and of the surrender and cancellation of the note and mortgage, the mortgagor declares that he has no interest in the land, which had previously been quitclaimed to the mortgagee. *Eyanson v. Waidlich* ..... 234

**CONDEMNATION:**

Taking property for public use, see EMINENT DOMAIN.

**CONDITIONS:**

Precedent to action to annul tax judgment, see TAXATION, 10, 11.
As affecting tender, see TENDER.

**CONDUCT OF COUNSEL:**

Of counsel in civil actions, see TRIAL, 12-14.

**CONFIRMATION:**

Of assessment for public improvements, appeal from, see MUNICIPAL CORPORATIONS, 20, 21.

**CONFLICT OF LAWS:**

As to community property, see HUSBAND AND WIFE, 1, 2.
Statutes and ordinances, see MUNICIPAL CORPORATIONS, 1.

**CONSIDERATION:**

For compromise and settlement, see COMPROMISE AND SETTLEMENT.
Of contract in general, see CONTRACTS, 1.

**CONSTITUTIONAL LAW:**

Rights of counties to control highways, see COUNTIES.
Trenching jurisdiction of courts, see CRIMINAL LAW, 6.
Condemnation of property, see EMINENT DOMAIN.
Due process, see PARTIES, 3.
Subjects and titles of statutes, see STATUTES, 2.
Equality and uniformity in taxation, see TAXATION, 2.

1. CONSTITUTIONAL LAW—VESTED RIGHTS — LIMITATIONS — REPEAL—RIGHTS IN STREETS. The legislature has the power, even after the statute of limitations has run, to take away from a city the right to plead the statute in respect to adverse possession of a city street, as the matter is one of public concern only, and not a property right of the city. *State v. Seattle*..... 602

**CONSTRUCTION:**

Of contracts, see CONTRACTS, 2.

**CONTEST:**

Of will, see WILLS.

**CONTIGUOUS:**

Land, see LOGS AND LOGGING, 5.

**CONTRACTS:**

Recovery on *quantum meruit*, see ABATEMENT AND REVIVAL.
Alteration, see ALTERATION OF INSTRUMENTS.
Compensation of broker, see BROKERS.
Cancellation, see CANCELLATION OF INSTRUMENTS.
Transportation of goods, see CARRIERS.
Executory, priorities, see CHATTEL MORTGAGES, 3.

CONTRACTS—CONTINUED.

Compromise, see COMPROMISE AND SETTLEMENT.
Subscription to corporate stock, see CORPORATIONS, 1-3.
Covenants in deeds, see COVENANTS.
Liquidated damages or penalties, see DAMAGES, 2, 3.
Breach of, see EQUITY, 1.
Parol evidence to vary, see EVIDENCE, 3, 4.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Separation agreements, see HUSBAND AND WIFE, 8, 9.
Of indemnity, see INDEMNITY.
Recovery on several contract, see JUDGMENTS, 3.
Action for breach, see JUDGMENTS, 3.
Cutting and hauling logs, see LOGS AND LOGGING, 1, 2.
Of marriage, see MARRIAGE.
Of cities in general, see MUNICIPAL CORPORATIONS, 2-4.
Release of rights, see RELEASE.
Sales of personalty, see SALES.
Specific performance, see SPECIFIC PERFORMANCE.
Stipulation in actions, see STIPULATIONS.
Operation and effect of usury laws, see USURY.
Sale of land, see VENDOR AND PURCHASER.

1. CONTRACTS — CONSIDERATION — FORBEARANCE. Forbearance of a threatened suit to enjoin certain work, is a sufficient consideration for a promise to pay all damages resulting from the work, where the claim was disputed and doubtful, although there was no liability for the damages. *Snohomish River Boom Co. v. Great Northern R. Co.* ..... 693

2. CONTRACTS—ENTIRE OR SEVERABLE—PAYMENTS. A contract to clear five acres of land is severable, where the owner agreed to pay for the three first acres $140 per acre, $100 payable when each acre is completed, $75 when the fourth was completed, and balance when all was completed. *Harstad v. Olson* ..... 264

3. CONTRACTS — BUILDING CONTRACTS — SUBSTANTIAL PERFORMANCE — BREACH. The rule that substantial compliance with a building contract will entitle the contractor to recover a balance due thereon, or on quantum meruit, cannot be invoked in behalf of a contractor who "knowingly and wilfully violated the terms of the contract," and was guilty of fraud in "skinning the job." *Mortimer v. Dirks* ..... 402

4. CONTRACTS—ACTIONS—DEFENSES—ISSUES. In an action on a building contract for a balance due, the plaintiff cannot avoid the provision for liquidated damages for delay by asserting *quantum meruit* under the claim that the contract was avoided by alterations, or by the fact that the owner did not stop the work, he having pursued the remedy provided in the contract for liquidated damages. *Williams v. Rosenbaum* ..... 94

**CONVEYANCES:**

Description of boundaries, see BOUNDARIES.
Of personalty as security for debt, see CHATTEL MORTGAGES.
In general, see DEEDS.
By husband or wife, see HUSBAND AND WIFE, 3, 4.
As security for debt, see MORTGAGES.
In trust, see TRUSTS.

**CORPORATIONS:**

Entitled to condemn lands, see LOGS AND LOGGING, 3.
Railroad companies, see RAILROADS.

1. CORPORATIONS—OFFICERS AND AGENTS—AUTHORITY TO CONTRACT—VENDOR AND PURCHASER. A sales agent for a corporation has apparent authority to enter into a contract, and may therefore bind the company to refund all purchase money paid after payment of six monthly installments, if the purchaser is then dissatisfied, where it appears that the agent had general authority to make sales, and that the officers and agents met at frequent intervals to discuss the affairs of the company, on which occasions the president authorized the sales agents to make such a contract with purchasers; since the sales agents had a right to assume that the corporation was speaking through its president, unless the contrary appears. *Livieratos v. Commonwealth Security Co*..... 376

2. CORPORATIONS—STOCK—CANCELLATION—FRAUD—COMPLAINT — SUFFICIENCY. In an action by a corporation to cancel corporate stock issued to promoters in trust for the corporation, and fraudulently exchanged by them for property taken at an overvaluation, a complaint alleging fraudulent representations, whereby subsequent stockholders were induced to take corporate stock, is demurrable for want of sufficient facts, where it fails to allege that the subsequent stockholders did not have opportunity to investigate the value of the property, or did not receive full value for their stock, and no rights of creditors were involved; since the fraud did not cause any actionable injury. *Inland Nursery and Floral Co. v. Rice*..... 67

3. CORPORATIONS—STOCK—EXCHANGE FOR PROPERTY—OVERVALUATION. A corporation cannot maintain an action to cancel stock issued to its promoters in exchange for property taken at an overvaluation, where no rights of creditors are involved and subsequent stockholders obtained full value in the purchase of their stock; and it is immaterial that the promoters were trustees of the corporation and in a measure dealing with themselves. *Inland Nursery and Floral Co. v. Rice*..... 67

4. CORPORATIONS—RECEIVERS—APPOINTMENT—GROUNDS — ACTS ULTRA VIRES. The fact that a realty and investment company is acting *ultra vires* in violation of the trust company act is not ground for

CORPORATIONS—CONTINUED.

the appointment of a receiver at the suit of subscribers, since only the state can question the acts of the company on that ground. *Frost v. Puget Sound Realty Associates* ..... 629

5. SAME—EVIDENCE—SUFFICIENCY. It is error to appoint a temporary receiver of a realty and investment company, at the suit of a few subscribers, where the evidence shows solvency, careful and capable business management and no probable loss to subscribers that can be avoided by a receivership. *Frost v. Puget Sound Realty Associates* ..... 629

6. SAME—REMEDY AT LAW. The wrongful payment of commissions by a realty and investment company to one of its trustees is not ground for the appointment of a receiver, where the subscriber has a remedy at law without the aid of a receivership. *Frost v. Puget Sound Realty Associates* ..... 629

**CORROBORATION:**

Of prosecutrix in prosecution for rape, see RAPE.
Of plaintiff's testimony in action for seduction, see SEDUCTION.

**COSTS:**

On foreclosure of chattel mortgage, see CHATTEL MORTGAGES, 4.
On foreclosure, see MORTGAGES, 1.

**CO-TENANCY:**

See TENANCY IN COMMON.

**COUNSEL:**

See ATTORNEY AND CLIENT.

**COUNTERCLAIM:**

See SET-OFF AND COUNTERCLAIM.

**COUNTIES:**

Tax for state aid roads, see TAXATION, 2.

1. COUNTIES—POWERS—CONSTITUTIONAL LAW—HIGHWAYS — IMPROVEMENT. The provision of the constitution vesting in counties the right of local self-government is not violated by the state aid road law (Rem. & Bal. Code, § 5880) authorizing the construction of state aid roads under the direction of the state highway commissioner, upon plans adopted by the county commissioners, the expense to be paid in part by the county and the local road district. *Meehan v. Shields* ..... 617

**COURSES AND DISTANCES:**

See BOUNDARIES.

**COURTS:**

Review of decisions, see APPEAL AND ERROR.
Former decision as law of the case on subsequent appeal, see APPEAL AND ERROR, 35.
Jurisdiction over criminal prosecution, see CRIMINAL LAW, 5-6.
Judges, see JUDGES.
Conclusiveness of judgments, see JUDGMENTS, 2-5.
Province of court and jury, see TRIAL, 2-5.

**COVENANTS:**

1. COVENANTS—INCUMBRANCES—BUILDING RESTRICTION. A building restriction in the chain of title, whereby the grantor in a warranty deed was prohibited from erecting certain kinds of buildings after ten years or building within a certain distance of the street, constitutes a breach of a covenant against incumbrances; and a right of action accrues immediately before assertion of any right under the restriction. *Williams v. Hewitt* ..... 62

2. COVENANTS—AGAINST INCUMBRANCES—DAMAGES — ASCERTAINMENT —MEASURE. It cannot be objected that damages for breach of covenant against incumbrances by reason of building restrictions are not susceptible of ascertainment with mathematical accuracy, the measure of damages being the diminished value of the land. *Williams v. Hewitt* ..... 62

3. SAME—NOTICE OF INCUMBRANCE—EFFECT. A covenant against incumbrances protects against a building restriction in the chain of title of which the grantee had notice by record, as it covers known as well as unknown defects. *Williams v. Hewitt* ..... 62

4. SAME—DAMAGES—EVIDENCE OF VALUE—ADMISSIBILITY. In an action for breach of covenant against incumbrances, evidence of the loss of a sale of the property by reason of the incumbrance is inadmissible to show the diminished value of the property. *Williams v. Hewitt* ..... 62

**CREDIBILITY:**

Of witness, see WITNESSES, 2, 3.

**CREDITORS:**

Subrogation to rights of creditor, see SUBROGATION.

**CRIMINAL LAW:**

See LEWDNESS; LIBEL AND SLANDER; RAPE.
Allegations in indictment, see INDICTMENT AND INFORMATION.
Marriage to secure release from arrest for seduction as affecting annulment on ground of duress, see MARRIAGE, 4.
Practicing without license, see PHYSICIANS AND SURGEONS, 2, 3.

1. CRIMINAL LAW—FORMER JEOPARDY—APPEAL FROM JUSTICE—SUBSEQUENT INFORMATION. Upon appeal after a trial on a complaint before

CRIMINAL LAW—CONTINUED.

a justice of the peace, the filing of an information in the superior court does not work a dismissal of the complaint or constitute a bar to the prosecution. *State v. Poyner*..... 489

2. CRIMINAL LAW—TRIAL—ELECTION OF DATES—SUFFICIENCY. Upon a charge of rape committed between the first and the 26th days of a specified month, an election, upon demand of the defendant, to prove an offense committed between the 19th and 26th days is sufficiently specific. *State v. Biggs*..... 514

3. CRIMINAL LAW — APPEALS — JURISDICTION — TRIAL DE NOVO—NEW SENTENCE. Upon appeal from a municipal court in a prosecution for the violation of a city ordinance, there is a trial *de novo* and judgment on the last conviction, authorizing the superior court to enter a greater fine than that imposed by the lower court. *State v. Hagimori* ..... 623

4. CRIMINAL LAW—REVIEW—RECORD—QUESTIONS PRESENTED—MISCONDUCT OF COUNSEL. An objection to a certain statement of counsel to the jury will not be considered on appeal where the record fails to show any such statement as claimed in the objection. *State v. Poyner* ..... 489

5. CRIMINAL LAW—JUSTICE OF THE PEACE—JURISDICTION—ORDINANCE —VIOLATION—STATUTES—AMENDMENT. Under Laws of 1901, p. 34, ch. 35 (which amended Bal. Code, § 4683), providing that the jurisdiction of justices of the peace over misdemeanors shall be concurrent with the superior courts except that the fine shall in no event exceed $100, and adding at the end of the section that justices shall have jurisdiction over all criminal cases coming under any city ordinance, a justice of the peace is not limited to a fine of $100 in cases coming under city ordinances, especially in view of the fact that the act of 1901 simply amended Bal. Code, § 4683, by omitting therefrom an express limitation to that effect. *State v. Hagimori*..... 623

6. SAME—TRENCHING UPON SUPERIOR COURT—CONSTITUTIONAL LAW. An act conferring upon justices of the peace jurisdiction to impose a fine not exceeding $300 for violation of a city ordinance against the lessor of a gambling house, when the state law on the same subject limited the superior courts to a fine of $100, does not trench upon the jurisdiction of the superior courts, in violation of Const., art. 4, § 10, in view of Const., art. 4, § 6, conferring jurisdiction upon justices in all cases of misdemeanors not otherwise provided by law. *State v. Hagimori*..... 623

**CROPS:**

Chattel mortgage on, see CHATTEL MORTGAGES, 1, 2.

**CROSS-APPEALS:**

Necessity for, to review errors, see APPEAL AND ERROR, 22.

**CROSS-EXAMINATION:**

See WITNESSES, 1.

**CROSSINGS:**

Private, duty to install, see RAILROADS, 1.
Accident at street railroad crossings, see STREET RAILROADS.

**CRUELTY:**

Ground for divorce, see DIVORCE, 2, 4.

**CUMULATIVE EVIDENCE:**

As ground for new trial, see NEW TRIAL.

**CUSTOM:**

Instruction as to customary acts in performance of work, see MASTER AND SERVANT, 11.
Evidence of custom to warn servant of danger, see MASTER AND SERVANT, 23.

**DAMAGES:**

Liquidated, see CONTRACTS, 4.
For breach of covenant, see COVENANTS.
In action for wrongful death, see DEATH.
Compensation for appropriation under power of eminent domain, see EMINENT DOMAIN.
Double damages in unlawful detainer against tenant, see LANDLORD AND TENANT, 11.
Floatage of logs, see LOGS AND LOGGING, 3-5.
For injuries to abutting property by construction of public works, see MUNICIPAL CORPORATIONS, 8-11, 16-19.
Ground for new trial, see NEW TRIAL, 1, 2.
Release of claim for damages, see RELEASE.
For breach of contract for sale of goods, see SALES.
For change of grade of street, see STATUTE, 3.

1. DAMAGES—FUTURE PAIN AND SUFFERING. An instruction authorizing a recovery for such suffering and pain as the jury think probable from the testimony he would experience in the future, is not erroneous as failing to limit the recovery thereof to the damages which it is reasonably certain he will suffer. *Harris v. Brown's Bay Logging Co*..... 8

2. DAMAGES—LIQUIDATED DAMAGES—ACCEPTING PARTIAL PERFORMANCE—PENALTY. Liquidated damages of $500, for the vendee's failure to complete a purchase of lots for the agreed price of $2,400, cannot be recovered where the vendor accepted $1,000 for one of the lots and made deed therefor, and also $80 on account of damages sustained; especially where no actual damages were alleged or proved; as liquidated damages cannot be recovered after acceptance of part

DAMAGES—CONTINUED.

performance of the contract; and if the agreed sum was intended to cover a partial breach it would be a penalty and not recoverable. *Myers v. Ralston*..... 47

3. DAMAGES—CONTRACTS—LIQUIDATED DAMAGES—DELAY IN BUILDING. A provision in a building contract for liquidated damages of $10 per day for delay in completing the building is valid, and entitles the owner to damages for such part of the delay as was not due to his fault, and is not avoided by redical alterations, where the contract made provision therefor. *Williams v. Rosenbaum*..... 94

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $4,500 for a fall upon a defective sidewalk, resulting in the breaking of a forearm just above the wrist, is excessive, and should be reduced to $2,500, where it appears that the plaintiff, a woman of 54 years of age, had not been engaged in heavy work, that the fracture was set with good results, although not allowing as full movement as before, and while the wrist was weak it was getting stronger, and no other serious injury was shown. *Hase v. Seattle*..... 230

5. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict of $9,000 for personal injuries is not excessive, where it appears that the plaintiff, a blacksmith and engineer, 32 years of age, in good health and earning three dollars per day, was injured by the breaking of a cable, was in a hospital eight weeks, one kidney was removed, suffered greatly, and was put to an expense of $700 to $1,000 for treatment. *Alkire v. Myers Lumber Co*..... 301

6. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $8,500 for injuries sustained in a fall upon a defective sidewalk, reduced by the trial judge to $5,000, will not be set aside as excessive, where the plaintiff was severely injured in her back, side, and neck, is suffering from traumatic lumbago and violent headaches, and there was evidence that she was permanently afflicted with severe nervous prostration from shock. *Falldin v. Seattle*.... 307

7. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $5,500 for personal injuries sustained by the driver of a water wagon, 64 years of age, earning four dollars per day with his team, is not excessive, where he sustained a compound comminuted fracture of the left ankle and lower part of the right leg, bones were crushed and protruded through the flesh, he was confined to his bed three months, the healing was not complete in six months, and the injury was permanent, requiring the use of a stiff shoe and crutch. *Kincaid v. Walla Walla Valley Traction Co*..... 334

**DAMS:**

Use of dams in floating logs, see LOGS AND LOGGING, 3, 4.

**DEAD BODIES:**

Rights in burial lots, see CEMETERIES.

**DEATH:**

Caused by electricity, see ELECTRICITY.
Of applicant pending application, see PENSIONS.

1. DEATH—EXCESSIVE DAMAGES. A verdict for the death of a husband and father, for $27,000, reduced by the trial court to $18,000, is still excessive, and should be reduced to $12,000, where the deceased was thirty-nine years of age and earning a salary of seventy-five dollars a month in a grocery store. *Ohrstrom v. Tacoma*... 121

**DECEDENTS:**

See EXECUTORS AND ADMINISTRATORS.

**DECISION:**

On appeal, see APPEAL AND ERROR, 35.

**DEDICATION:**

Of cemeteries, see CEMETERIES, 2.

1. DEDICATION—TITLE—PUBLIC LANDS—TIDE LANDS—PLATS. Where an upland owner's plat included abutting tide lands belonging to and afterwards platted by the state, the portion of the plat extending over the tide lands is void. *Cook v. Hensler*..... 392

2. DEDICATION—IMPLIED AT COMMON LAW—CEMETERIES. There is an implied irrevocable common law dedication of a tract of land to a public use, where it appears that the tract was, with the owner's consent, used by the entire neighborhood for a burying ground from 1854 to 1884, no grant or particular ceremony being necessary. *Roundtree v. Hutchinson*..... 414

**DEEDS:**

Of university land, see ADVERSE POSSESSION, 2.
Description of boundaries, see BOUNDARIES.
Cancellation, see CANCELLATION OF INSTRUMENTS.
Validity, construction and effect of covenants in deeds, see COVENANTS.
Parol or extrinsic evidence contradicting or varying deed, see EVIDENCE, 4.
Reservations, see LANDLORD AND TENANT, 6.
State deed of tide lands, see PUBLIC LANDS, 5.
Tax deeds, see TAXATION, 6-11.
In trust, see TRUSTS, 4.
As notice to purchaser, see VENDOR AND PURCHASER, 1-4.

1. DEEDS—INTEREST CONVEYED—ESTOPPEL—VENDOR AND PURCHASER—AFTER-ACQUIRED TITLE—MORTGAGE FORECLOSURE. Under Rem. & Bal. Code, § 8765, and independently thereof, an after-acquired title inures to the benefit of the grantee, and this rule applies to titles acquired through mortgage foreclosures. *Gough v. Center*..... 276

DEEDS—CONTINUED.

2. DEEDS—INTENT OF GRANTOR—EVIDENCE—ISSUES AND PROOF. The plaintiff cannot complain of the admission of evidence of the intent of the grantor as to the lands sought to be conveyed by a deed, where the complaint did not rely upon the description, but tendered an issue as to the intent, which was met by the answer. *Cook v. Hensler* ..... 392

3. DEEDS — CONSTRUCTION — LANDS CONVEYED — INTENT—EVIDENCE—SUFFICIENCY. The evidence is sufficient to establish that a deed of certain blocks and lots in an upland plat, which overlapped tide lands belonging to the state at the time the plat was filed, was intended to convey only the upland portion of the overlapping blocks and lots mentioned, which was the only legal portion of the plat when filed, where it appears that the grantor had also acquired title to the tide lands from the state, that the deed made no mention of the overlapping tide lands as designated in the state tide land plat, and excluded the grantor's other lots and blocks of the upland plat which were wholly tide lands, that the tide land plat had been filed nine years, and the grantor and grantee testified that it was the intention to convey only the uplands. *Cook v. Hensler*..... 392

4. DEEDS—DESCRIPTION—CERTAINTY. A deed of the "west half of the south of the southwest section twenty-two" is indefinite and uncertain, and insufficient to show title to the north half of the southwest quarter of the southwest quarter of the section. *Brodsky v. Nelson* ..... 671

**DE FACTO OFFICERS:**

See OFFICERS.

**DEFAMATION:**

See LIBEL AND SLANDER.

**DEFAULT:**

Judgment by, see JUDGMENT, 1.

**DEFECT:**

In title defeating contract of sale of land, see VENDOR AND PURCHASER, 12-16.

**DEFICIENCY:**

On enforcement of mechanic's lien, see MECHANICS' LIENS, 5.

**DEMURRAGE:**

See DAMAGES, 2, 3

**DEPARTURE:**

See PLEADING, 1.

**DEPOSIT IN COURT:**

See TENDER.

**DESCENT AND DISTRIBUTION:**

Administration of estates of decedents, see EXECUTORS AND ADMINISTRATORS.

Rights of survivor in community estate, see HUSBAND AND WIFE, 7.

**DESCRIPTION:**

Of property conveyed, see BOUNDARIES.

Of property in deeds, see DEEDS, 2, 4.

Of subject-matter in proceedings to perfect mechanics' lien, see MECHANICS' LIENS, 2.

**DILIGENCE:**

Affecting right to new trial, see NEW TRIAL, 7-9.

In perfecting title to land, see VENDOR AND PURCHASER, 12-14.

**DISCHARGE:**

See COMPROMISE AND SETTLEMENT.

Of attorney, see ATTORNEY AND CLIENT, 2.

From claim for damages, see RELEASE.

**DISCONTINUANCE:**

Of action, see DISMISSAL AND NONSUIT.

**DISCOVERY:**

Of mineral, see MINES AND MINERALS, 1.

**DISMISSAL AND NONSUIT:**

Harmless error in, see APPEAL AND ERROR, 34.

Manner of, see TRIAL, 2.

At trial, see TRIAL, 5.

1. DISMISSAL AND NONSUIT—VOLUNTARY—DISCRETION. It is not an abuse of discretion to refuse a voluntary dismissal of an action to quiet title after it had been consolidated with another suit in which defendants asked affirmative relief. *Curry v. Wilson*..... 509

2. DISMISSAL AND NONSUIT—FAILURE TO PROSECUTE. No abuse of discretion appears in the dismissal of an action for want of prosecution, where more than six years elapsed after the filing of answers before any steps were taken, and plaintiff only then moved for judgment on the pleadings after defendants' motion to dismiss. *Rehmke v. Fogarty* ..... 412

**DISSOLUTION:**

Of marriage, see MARRIAGE.

**DISTRIBUTION:**

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS, 3-6.

**DIVERSION:**

Of tax, see TAXATION, 2.

**DIVISION LINES:**

See BOUNDARIES.

**DIVORCE:**

Annulment of marriage, see MARRIAGE.

1. DIVORCE — GROUNDS — INCOMPATIBILITY — PERSONAL INDIGNITIES — FINDINGS—SUFFICIENCY. A decree for a divorce, where the evidence is not brought up on appeal, is supported under a liberal construction of findings to the effect that the condition of the home life of the parties has been such as to cause an utter estrangement and loss of love and affection, without fault on the plaintiff's part, and that longer living together is a source of great mental worry and anguish to the plaintiff, and the parties can no longer live together; the same being in effect a finding of personal indignities rendering life burdensome. *Bloom v. Bloom*..... 23

2. DIVORCE—CRUELTY—EVIDENCE—SUFFICIENCY. Findings that there was no cruelty warranting a divorce are sustained, where it appears that quarrels and bickerings prompted the wife to consult attorneys about a divorce a few days after the marriage, that she left him several times and returned, and commenced the action within two and a half months after the marriage; disappointment as to property and ill feeling between the husband and his wife's parents appearing to be the principal cause of their trouble. *Wilhelm v. Wilhelm* ..... 157

3. DIVORCE —GROUNDS — INCOMPATIBILITY — EVIDENCE — SUFFICIENCY. Rem. & Bal. Code, § 982, authorizing a divorce for certain causes and "any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together," does not authorize a divorce merely because the parties cannot live together; and it is error to grant a divorce to a husband upon evidence of incompatibility, quarrels and irritation for which he was as much to blame as his wife, and no other sufficient cause appears. *Bickford v. Bickford* ..... 639

4. DIVORCE—GROUNDS—CRUELTY—CHARGE OF UNCHASTITY. A divorce is warranted on the ground of cruelty and personal indignities rendering life burdensome, where the husband, in the presence of others and of grown children, continually charged his wife with unchastity and denied the authorship of his children. *Morris v. Morris*... 465

5. DIVORCE—DISPOSITION OF PROPERTY. The court is without jurisdiction to make any disposition of real property of the parties not mentioned in divorce proceedings. *Carpenter v. Brackett*..... 460

**DOCTORS:**

See PHYSICIANS AND SURGEONS.

**DOMICILE:**

See HUSBAND AND WIFE, 1.

**DUE PROCESS:**

See PARTIES, 3.

**DURESS:**

As ground for annulment of marriage, see MARRIAGE, 3, 4.

**EASEMENTS:**

Grant, necessity for acknowledgment, see ACKNOWLEDGMENT.
Abandonment of, see ADVERSE POSSESSION, 1.
Estoppel to dispute, see VENDOR AND PURCHASER, 3.

1. EASEMENTS—ABANDONMENT—EFFECT OF NONUSER. Mere nonuser for ten years of a right of way granted for a logging road will not defeat the right, or amount to abandonment of the easement, where no time was stipulated for the use and no provision was made in the grant for restoration of the land on failure to use the same. *McAdam v. Benson Logging & Lumbering Co*..... 407

2. EASEMENTS — ABANDONMENT — INTENT — EVIDENCE — SUFFICIENCY. Abandonment of an easement is not shown by the fact that the rails of a logging road were taken up and the right of way not used for ten years, where there was no provision that the land should revert by nonuser, the rails were taken up for temporary use pending litigation of the title to the timber lands served by the road, and the financial depressions of 1893 compelled further suspension of operations for several years, it being testified that there was no intention to abandon the road. *McAdam v. Benson Logging & Lumbering Co*..... 407

**EJECTMENT:**

Defenses, see ADVERSE POSSESSION, 1.
Recovery of land by administrator, see EXECUTORS AND ADMINISTRATORS, 9.
Recovery of leased premises, see LANDLORD AND TENANT, 3-11.

1. EJECTMENT—EVIDENCE—BURDEN OF PROOF—SUFFICIENCY. In ejectment, the burden is upon the plaintiff to establish his title; and he fails to do so, as regards a disputed boundary line, where it appears that the line is not located on the ground, and it is reasonably certain defendant is not occupying any of plaintiff's land, plaintiff's main contention being for a sixty-foot overlapping strip, under a deed subsequent to defendant's deed. *Lundell v. Allen & Nelson Mill Co.* ..... 150

2. EJECTMENT—DEFENSES—ALIENAGE—BURDEN OF PROOF. In ejectment, the burden is upon defendant to establish the defense that an after-acquired title, inuring to the benefit of the plaintiff, was lodged in an alien incapable of acquiring real property in this state. *Gough v. Center*..... 276

**ELECTION OF REMEDIES:**

See EXECUTION.

**ELECTIONS:**

To treat mortgage debt as due on default, see MORTGAGES.

1. ELECTIONS — CANDIDATE — ELIGIBILITY — POWERS OF COMPTROLLER. Under a charter limiting the right to file declarations of candidacy to those persons "who shall be eligible" for the office sought, the city comptroller has power to inquire into the eligibility of candidates and refuse to certify the same if ineligible, although no statute or charter provision expressly authorizes such inquiry. *State ex rel. Chealander v. Carroll*..... 202

**ELECTRICITY:**

Condemnation for light plant, see EMINENT DOMAIN.

1. ELECTRICITY—NEGLIGENCE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence on the part of a city in failing to ground secondary circuits connected with its high voltage primary circuits, and in failing to cut off the circuit after notice of danger, where it appears that the city had notice of a ground on the primary circuit which allowed the high voltage to flow into the secondary system, where it was very dangerous to human life, and failed to cut out the circuit as it might have done by turning a switch, that its electrical code declared the danger, stating that it could be obviated by grounding the secondary circuits, and that the National Board of Fire Underwriters had called the city's attention to the dangerous conditions, and recommended grounding the secondary circuits. *Ohrstrom v. Tacoma*..... 121

2. SAME—EVIDENCE OF DEATH. There is sufficient evidence to establish that plaintiff's decedent met his death by coming in contact with a city electric system, where it appears that he was employed by the company whose circuit was charged with a high voltage by reason of a ground, that deceased was the first to turn on the electric lights in the morning, and was in the habit of doing so at a place where dampness made a good conductor, that he started for such place according to his custom, when he was heard to shout and staggered, coming from the electric light and fell near the light and was picked up immediately and found to be dead, his left hand was burned, a physician gave the cause of his death as electric shock, and his body had the appearance produced by death from electric shock; the deceased being in good health, no other cause for death being shown, and others having received shocks the same morning on the same circuit. *Ohrstrom v. Tacoma*..... 121

3. SAME—EVIDENCE OF DEATH—ADMISSIBILITY. In an action for death caused by contact with an overcharged secondary electric circuit supplying several establishments, it is competent, on the question of the dangerous condition of the circuit and of the city's negli-

ELECTRICITY—CONTINUED.

gence, to show that another man in one of the other establishments on the same circuit was found dead from an electric shock, a few moments before; and the evidence cannot be excluded because of its tendency to prejudice the jury. *Ohrstrom v. Tacoma*..... 121

**EMINENT DOMAIN:**

By boom company, see LOGS AND LOGGING, 3-5.

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 5-11, 18, 19.

Notice of trial, see TRIAL, 1.

1. EMINENT DOMAIN—CHANGE OF GRADE—DAMAGE. The original grading of a city street is not a taking or damaging of property, within Const., art. 1, § 16. *Ettor v. Tacoma*..... 50

2. EMINENT DOMAIN—TITLE ACQUIRED—FEE—DEVOTION TO OTHER USES—EFFECT. Where a full fee simple title is condemned by a city for a particular use, and the award is paid out of the general fund and accepted, the land does not revert to the owner upon the city's devoting it to some other use; and the former owner cannot complain if an easement therein is subsequently granted to a railroad company. *Reichling v. Covington Lumber Co*..... 225

3. EMINENT DOMAIN—PRIVATE USE—STATUTES—PARTIAL VALIDITY. Under Rem. & Bal. Code, § 8005, authorizing cities to condemn property for lighting, heating, and power purposes "public and private" the word "private" will be eliminated as a nullity, as it is not so commingled with the public uses that they cannot be separated, and the remainder of the act is constitutional as a complete act capable of execution in accordance with the legislative intent. *Tacoma v. Nisqually Power Co*..... 420

4. EMINENT DOMAIN—PUBLIC AND PRIVATE PURPOSES—PLEADING—TEST. While a city cannot condemn property where the use is for commingled public and private purposes, an allegation in the city's petition that it has, since 1893, been furnishing facilities for lighting, heating and power purposes "public and private," will not defeat the proceeding; since the test is the ultimate purpose now sought, and not what was done in the past. *Tacoma v. Nisqually Power Co.* ..... 420

5. EMINENT DOMAIN — PUBLIC NECESSITY — POWER REQUIRED — EXPECTED INCREASE—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that there is a necessity for the acquisition of 20,000 horse power for public lighting purposes, where the city now uses 9,000 horse power under contract with a power company, that in the past three years the increase has been from 3,400 to 9,000 horse power and from 5,228 lighting meters to 11,258, with an increase of one hundred miles of wire in the last six months, and that at the same ratio, the increase in the next ten years would require 20,000 to 25,000 horse power. *Tacoma v. Nisqually Power Co*..... 420

EMINENT DOMAIN—CONTINUED.

6. EMINENT DOMAIN—PUBLIC USE—LIGHTING — PEAK LOAD — INCIDENTAL PRIVATE USE. Since a municipal power plant for electric lighting must provide for the peak load, or maximum power required on the shortest day of the year, the sale by the city of current for heating and cooking devices and running small machines such as lathes, etc., in the meantime, is so insignificant and incidental to the main public use as not to defeat the right to condemn property for the maximum public use required. *Tacoma v. Nisqually Power Co.* ..... 420

7. SAME—PROPERTY DEVOTED TO PUBLIC USE—LEGISLATIVE POWERS. The more extended and beneficial public use employed by a municipal corporation amounts to a reasonable necessity for and authorizes the taking of the property of a public service corporation already devoted to the same public use, under Const., art. 12, § 10, declaring that the exercise of the right of eminent domain shall not be abridged to prevent the legislature from taking the property and franchises of incorporated companies; the legislature being exclusively vested with the right to determine under what circumstances, and to what extent, the power may be exercised. *Tacoma v. Nisqually Power Co.*..... 420

8. SAME—STATUTES. Rem. & Bal. Code, § 8005, authorizing cities to condemn for public purposes "works, plants, and facilities," either expressly or by necessary implication grants the right to acquire works and plants of private corporations already devoted to a public use. *Tacoma v. Nisqually Power Co*..... 420

9. EMINENT DOMAIN—FOR STREETS—PETITION—DESCRIPTION OF PROPERTY. In proceedings by a city to condemn land for a street, under Rem. & Bal. Code, § 7771, the petition need not describe land damaged or the whole tract out of which the land is taken, but only the land taken. *Tacoma v. Wetherby*..... 295

10. SAME—NECESSITY OF ANSWER. In condemnation proceedings by a city under Rem. & Bal. Code, § 7771, etc., no answer offering an issue is necessary. *Tacoma v. Wetherby*..... 295

11. EMINENT DOMAIN—FOR STREETS—DAMAGES—OFFSET OF BENEFITS. In eminent domain proceedings by a city, it is proper to instruct that benefits to adjacent property are to be deducted from the damages to such property, if the damage is in excess of the benefits, but if the benefits are equal, the jury must find the lands not damaged; regardless of questions that may arise on the assessment of benefits. *Tacoma v. Wetherby*..... 295

12. SAME—DAMAGES—EVIDENCE—CONSEQUENTIAL INJURY. In eminent domain proceedings by a city, the landowner may give evidence of consequential damages, although only the part of the land to be taken is described. *Tacoma v. Wetherby*..... 295

EMINENT DOMAIN—CONTINUED.

13. SAME—EVIDENCE—VALUES—PRICES PAID—HARMLESS ERROR. It is not so prejudicial as to require a reversal that, upon an issue as to the value of land condemned, the owner was asked on cross-examination what he paid for it, where defendant had asked a witness what had been paid for similar land, and there was other evidence as to the value, supplemented by a view by the jury. *Tacoma v. Wetherby* ..... 295

14. SAME—COMPARISON OF VALUES. Upon an issue as to the value of land condemned, it is not error to refuse to allow witnesses to approximate the value by reference to platted property, where the property was not plafted, and the owner had shown it to be especially valuable for factory purposes and special uses. *Tacoma v. Wetherby* ..... 295

15. EMINENT DOMAIN—VALUES—PROPERTY DEVOTED TO PUBLIC USE—EVIDENCE—ADMISSIBILITY. In condemnation proceedings by a municipal corporation of the property of a public service corporation, it is not error to exclude evidence showing that the defendant was a public service corporation, where the court was extremely liberal in allowing the value of the land to be shown, and witnesses were permitted to fix great values based upon every possible use and adaptability of the property. *Tacoma v. Nisqually Power Co...* 420

16. EMINENT DOMAIN — PROCEEDINGS — DAMAGES — VALUES—PROSPECTIVE PROFITS. In condemnation proceedings, evidence of the possible profits of a business that might be carried on on the property taken is inadmissible for the purpose of showing the value of the property. *Tacoma v. Nisqually Power Co* ..... 420

17. EMINENT DOMAIN—DAMAGES—TRIAL—CONSOLIDATION OF CASES—DISCRETION. In eminent domain proceedings by a city, it is discretionary, under Rem. & Bal. Code, § 7768, *et seq.*, to consolidate actions against the owner and the lessee, and the ruling will not be reviewed unless prejudice is clearly shown. *In re Western Avenue* ..... 290

18. EMINENT DOMAIN—TRIAL—SEPARATE TRIALS—DISCRETION. In eminent domain proceedings by a city, it is discretionary, under Rem. & Bal. Code, § 7774, to refuse separate trials to owners of the property, to be reviewed only for abuse of discretion. *Tacoma v. Wetherby* ..... 295

19. SAME—DECREE—DIVISION OF DAMAGES. In eminent domain proceedings by a city, Rem. & Bal. Code, § 7778, authorizes the assessment of one recovery of damages against the landlord and tenant, leaving it for division between the parties entitled thereto. *In re Western Avenue* ..... 290

20. EMINENT DOMAIN—APPEAL—RECORD—REVIEW. The refusal, in eminent domain proceedings, to allow evidence that the land had

EMINENT DOMAIN—CONTINUED.

been leased, will be presumed correct when a copy of the lease offered in evidence is not in the record. *Tacoma v. Wetherby*.. 295

21. EMINENT DOMAIN—APPEAL—HARMLESS ERROR—INSTRUCTIONS. It being immaterial that defendant, in condemnation proceedings, was a public service corporation, it is not reversible error to instruct that it was not. *Tacoma v. Nisqually Power Co*..... 420

22. SAME—INSTRUCTIONS AS TO VALUES. In condemnation proceedings, error in instructing the jury that they should fix the values from their observations of the property assisted by the testimony, is harmless where other instructions gave the jury proper rules for determining the values, and stated that their view of the premises was to enable them to better understand the testimony. *Tacoma v. Nisqually Power Co*..... 420

EMPLOYEES:

See MASTER AND SERVANT.

ENTRY:

Reentry by landlord, see LANDLORD AND TENANT, 3-11.

EQUITY:

See CANCELLATION OF INSTRUMENTS; SPECIFIC PERFORMANCE; TRUSTS.
Joinder of legal and equitable actions, see ACTIONS.
Equitable estoppel, see ESTOPPEL.
Suits to restrain execution, see EXECUTION.
Determination of adverse claim to real property, see QUIETING TITLE.
Jurisdiction to refer, see REFERENCE, 1.
Reference in action at law, see REFERENCE.

1. EQUITY—MAXIMS—CONTRACTS—BREACH. The maxim that equity will not suffer a wrong without affording a remedy has no application in an action for damages for breach of a contract made by defendant's attorney without defendant's knowledge. *Eisenberg v. Nichols* ..... 560

ESTATES:

Estates of deceased persons, see EXECUTORS AND ADMINISTRATORS.
Tenancy in common, see TENANCY IN COMMON.

ESTOPPEL:

See ADVERSE POSSESSION, 1.
To allege error in civil actions or proceedings, see APPEAL AND ERROR, 22.
As to after-acquired title, see DEEDS, 1.
By judgment, see JUDGMENT, 2-5.
Of tenant to dispute title of landlord, see LANDLORD AND TENANT, 2.
To resist lien, see MECHANICS' LIENS, 3.

ESTOPPEL—CONTINUED.

To claim damages by street improvements, see MUNICIPAL CORPORATIONS, 8, 12.
To plead *ultra vires*, see MUNICIPAL CORPORATIONS, 4.
To dispute easement, see VENDOR AND PURCHASER, 3.
Of vendee to deny title of vendor, see VENDOR AND PURCHASER, 19.

1. ESTOPPEL—PLEADING—SUFFICIENCY. An estoppel is sufficiently pleaded where the facts constituting it are all set forth, although the pleading fails to state the conclusion that the facts constitute an estoppel. *Spokane v. Costello*..... 183

2. ESTOPPEL—AS TO TITLE—BY PLEADING—HUSBAND AND WIFE—VENDOR AND PURCHASER. Where a vendor, in order to complete a sale, secured the appointment of a resident guardian for his insane wife in California, stating in the petition that the property was community property, he will be estopped from asserting that it was his separate estate and that his wife had no interest therein. *Colpe v. Lindblom* ..... 106

3. ESTOPPEL—PLEADINGS—VENDOR AND PURCHASER. In an action by a vendee to recover earnest money paid, the original complaint alleging defects in the title does not estop the plaintiff from alleging and proving that the owner never consented to the sale, made by defendant as agent subject to the owner's approval. *Bridge v. Calhoun, Denny & Ewing*..... 272

4. ESTOPPEL—STIPULATIONS—EFFECT. A stipulation that a mortgage was given, judgment of foreclosure entered, and a sale had and deed executed thereunder, estops the party from asserting want of jurisdiction to render the judgment. *Gough v. Center*..... 276

5. ESTOPPEL—JUDGMENTS—ACCEPTING BENEFITS. Where parties accepted the benefits of an award of damages given by a judgment in condemnation, they are estopped to assert that the judgment was void because entered upon an unauthorized stipulation. *James v. Seattle* ..... 318

6. ESTOPPEL—CONDUCT—JUDICIAL PROCEEDINGS—OBJECTION TO JURISDICTION. In an action to foreclose a materialman's lien upon a vessel, sureties who sign a bond offered for the purpose of releasing the vessel from the custody of a receiver and agree in the bond that their personal liability shall stand as security in place of the vessel in case the vessel is released, are estopped to assert that the order of the court, as prayed for, releasing the vessel, was without jurisdiction and not authorized by statute. *Kalb-Glibert Lumber Co. v. Cram*..... 550

**EVIDENCE:**

Prejudice from error on appeal, see APPEAL AND ERROR, 26-31.
Conclusion of witness, see APPEAL AND ERROR, 31.
On bills or notes, see BILLS AND NOTES.

EVIDENCE—CONTINUED.

To establish boundaries, see BOUNDARIES.
In suit for cancellation of instruments, see CANCELLATION OF INSTRUMENTS.
Of negligence in carriage of live stock, see CARRIERS.
On foreclosure of mortgage, see CHATTEL MORTGAGES.
On accounting, sufficiency, see CHATTEL MORTGAGES, 4.
Of compromise, see COMPROMISE AND SETTLEMENT.
Of value, see COVENANTS, 4.
Property conveyed by deed, see DEEDS, 3.
Creation and existence of easement, see EASEMENTS.
In ejectment, see EJECTMENT.
For personal injuries, see ELECTRICITY.
Value of property in condemnation proceedings, see EMINENT DOMAIN, 12-16.
As to reputation, see LEWDNESS.
For libel and slander, see LIBEL AND SLANDER.
Of duress as ground for annulment of marriage, see MARRIAGE, 3.
For injuries to servant in general, see MASTER AND SERVANT, 8, 15, 23-25.
To enforce mechanic's lien, see MECHANICS' LIENS, 2.
To establish and determine mining rights, see MINES AND MINERALS.
To foreclose mortgage, see MORTGAGES, 5.
For negligence or malpractice, see PHYSICIANS AND SURGEONS, 1.
To prove fact of agency, see PRINCIPAL AND AGENT, 2.
Of ownership of vessel, see PRINCIPAL AND AGENT, 1.
In suits to quiet title, see QUIETING TITLE, 2.
For injuries to persons on tracks, see RAILROADS, 2.
In prosecution for rape, see RAPE.
For injuries by street railroads to person on or near tracks, see STREET RAILROADS, 2.
In action for seduction, see TORTS.
Certified copies of certificate, see TRADEMARKS, 3.
Reception at trial, see TRIAL, 3-4.
Opinion of attorney, see TRIAL, 5.
To establish trust, see TRUSTS.
To show usury, see USURY.
Inconsistent statements to impeach witness, see WITNESSES, 2, 3.

1. EVIDENCE—JUDICIAL NOTICE—FINANCIAL PANIC. The court will take judicial notice of the financial panic prevailing in 1893 and subsequent years. *McAdam v. Benson Logging & Lumbering Co.* 407

2. EVIDENCE — SECONDARY EVIDENCE — NOTICE TO PRODUCE LETTER—TIME. It is not error to admit evidence of the contents of a letter, demanded only twelve days before the trial, on the theory that the time was not sufficient for procuring and forwarding the letter from Minneapolis; as the time appears ample, in the absence of proper showing to the contrary. *Keenan v. Lauritzen Malt Co*..... 367

EVIDENCE—CONTINUED.

3. EVIDENCE—PAROL TO VARY WRITING. Evidence to show that a contract had been partly performed, and part payment made before it was reduced to writing, is not inadmissible as varying by parol the terms of a written agreement. *Harstad v. Olson*..... 264

4. EVIDENCE — DEEDS — AMBIGUITY — INTENT — EXTRINSIC EVIDENCE. Where a deed granted blocks and lots designated in an upland plat which overlapped tide lands belonging to and afterwards platted by the state, there is a doubt or ambiguity in the deed as to the grantor's intent to include the tide land portion of the blocks and lots mentioned; since the upland plat was void as to such portions; and extrinsic evidence of the circumstances is admissible to show the intent. *Cook v. Hensler*..... 392

5. EVIDENCE—EXPERTS—QUALIFICATION—OPINIONS. A witness is not qualified to give an opinion as to the value of real estate along a certain street from the fact that he had lived in the city eight years and had been in the real estate business, where it was not shown that he had bought or sold property along the street or was otherwise familiar with values there or elsewhere in the city. *In re Western Avenue*..... 290

EXCEPTIONS:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 8-11.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see APPEAL AND ERROR, 16-18.

EXECUTION:

1. EXECUTION—INVALID WRIT—INJUNCTION—REMEDY AT LAW. A party whose property is seized on an invalid writ of execution has his choice of remedies, and the fact that he has a remedy at law to quash the execution or recover the property, will not bar his remedy in equity by injunction, since it is more speedy and efficacious to obviate a lien pending trial on the merits. *Cline Piano Co. v. Sherwood*..... 239

EXECUTORS AND ADMINISTRATORS:

Parties on appeal from final distribution, see APPEAL AND ERROR, 12.

1. EXECUTORS AND ADMINISTRATORS—NECESSITY FOR ADMINISTRATION —LIMITATIONS—DESCENT AND DISTRIBUTION. Under Rem. & Bal. Code, § 1366, providing that the fee title to lands shall vest in the heirs or devisees immediately upon the death of the ancestor, subject to debts, and § 1368, providing that no real estate shall be liable for the ancestor's debts unless letters be granted within six years after his death, administration upon community real estate is not necessary thirteen years after the death of the wife. *Duvall v. Healy Lumber Co*..... 446

EXECUTORS AND ADMINISTRATORS—CONTINUED.

2. EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—ORDER—EFFECT—WILLS—DESCENT AND DISTRIBUTION. Upon the probate of a will in favor of a husband, which was void as to the testator's children because they were not named or provided for in the will, a decree of final distribution awarding all the property to the husband, upon published notice as required by statute, is conclusive and binding upon the children, if unquestioned and unappealed from, notwithstanding Rem. & Bal. Code, § 1366, providing that upon the death of a person seized of lands, the title thereto shall vest immediately in his heirs or devisees. *In re Ostlund's Estate*..... 359

3. SAME—NOTICE OF APPLICATION FOR DISTRIBUTION. Under Rem. & Bal. Code, §§ 1499, 1500, and 1589, personal notice to the heirs is not necessary to confer jurisdiction upon the court to enter a final order of distribution which is binding and conclusive on them, although erroneous. *In re Ostlund's Estate*..... 359

4. EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—JURISDICTION—PROCESS—INFANTS—SERVICE ON GUARDIAN. A decree of distribution of an estate cannot affect the interests of a minor unless jurisdiction over him be acquired by service of notice upon his general guardian, if he have one, and if not, then by the appointment of a guardian *ad litem*. *Horton v. Barto*..... 477

5. SAME—JURISDICTION OVER HEIRS. Upon the distribution of an estate it is necessary to acquire jurisdiction over heirs or devisees of the deceased, or their descendants who died subsequently to the death of the deceased. *Horton v. Barto*..... 477

6. SAME—DISTRIBUTION—BONA FIDE PURCHASERS—INTERESTS NOT OF RECORD. A distributee upon final settlement of an estate, and his successors in interest, are not *bona fide* purchasers by reason of the fact that they had no notice of the interests of an heir which was not in the record chain of title; but they are bound to notice the interests of all who successively acquire title by inheritance or will. *Horton v. Barto*..... 477

7. EXECUTORS AND ADMINISTRATORS — ACTIONS — PARTIES—JOINDER—BONDS. The administrator of a deceased contractor, the principal on a bond, may, on rejection of the claim, be joined as a party defendant with the surety in an action on the bond; the proceedings for presenting claims against the estate and payment of judgments in course of administration making no difference in the nature of actions against administrators. *Spokane v. Costello*..... 183

8. SAME—JUDGMENT AGAINST ADMINISTRATOR—FORM. A judgment against an administrator should contain directions for its payment in course of administration, as required by Rem. & Bal. Code, § 1483, but failure to do so is not ground for reversal, where it can be so understood, or amended on appeal. *Spokane v. Costello*..... 183

EXECUTORS AND ADMINISTRATORS—CONTINUED.

9. SAME—ACTIONS BY ADMINISTRATOR—RECOVERY OF LAND—UNNECESSARY ADMINISTRATION. An administrator of community real estate, appointed without any necessity for administration, after the expiration of the six years within which letters must be granted in order to charge the land with the debts of the deceased, cannot maintain an action to recover the land, title to which had, by Rem. & Bal. Code, § 1366, vested in the heirs. *Duvall v. Healy Lumber Co.* ..... 446

EXEMPTIONS:

Exemption from forced sale of real property as homestead, see HOMESTEAD.

EXPERTS:

Value of lands, see EVIDENCE, 5.
Opinion of attorney, see TRIAL, 5.

EXPRESS TRUSTS:

See TRUSTS.

EXTENSION:

Of time for filing motion for new trial, see NEW TRIAL, 2.

FACTORS:

Consignment for sale, see SALES, 2.

FALSE REPRESENTATIONS:

Affecting validity of contract for sale of lands, see VENDOR AND PURCHASER, 21.

FALSE SWEARING:

*Falsus in uno, falsus in omnibus*, see WITNESSES, 3.

FARM CROSSINGS:

See RAILROADS, 1.

FEES:

Attorney, see ATTORNEY AND CLIENT.
On foreclosure, see MORTGAGES.

FELLOW SERVANTS:

See MASTER AND SERVANT, 14.

FENCES:

At farm crossings, see RAILROADS, 1.

FILING:

Statement of facts in lower court, see APPEAL AND ERROR, 18.

**FINDINGS:**

Review as dependent on presentation of objection below, see APPEAL AND ERROR, 8-11.

Review on appeal or writ of error, see APPEAL AND ERROR, 23.

**FINES:**

See MUNICIPAL CORPORATIONS, 1.

Jurisdiction of justices of the peace to impose, see CRIMINAL LAW, 5, 6.

**FISH:**

1. FISH—LICENSES—EXPIRATION—LOCATION. Where a license for a fish trap expires before any trap has been actually constructed, the place becomes open water subject to the first proper location for the next season. *Muller v. Apex Fish Co*..... 140

2. SAME—LOCATION—PLAT — DESCRIPTION — SUFFICIENCY. A clerical error in giving a fish trap location at a specified section corner in township 37, instead of township 33, will not invalidate a location, where the plat sufficiently identified the site by locating it off the west coast of Whidby Island, since no one could be misled. *Muller v. Apex Fish Co*..... 140

3. SAME—LICENSES—PREREQUISITE—FEDERAL PERMIT. A Federal permit is not a prerequisite to the issuance of a state license for a fish trap, and failure to secure the same cannot be urged as an excuse for trespass on the location, it being a matter between the locator and the Federal authorities. *Muller v. Apex Fish Co*... 140

**FORBEARANCE:**

Agreement to forbear as sufficient consideration, see CONTRACTS, 1.

**FORCIBLE ENTRY AND DETAINER:**

Action for unlawful detainer of leased premises, see LANDLORD AND TENANT, 3-11.

**FORECLOSURE:**

Of mortgage, see CHATTEL MORTGAGES.

Of mechanics' lien, see MECHANICS' LIENS.

Of mortgage, see MORTGAGES.

**FOREIGN LAWS:**

Question of law, see TRIAL, 5.

**FORMER JEOPARDY:**

Bar to prosecution, see CRIMINAL LAW, 1.

**FORNICATION:**

Lascivious cohabitation or conduct, see LEWDNESS.

**FRANCHISES:**

For street railway, see STREET RAILROADS, 1.

**FRAUD:**

Upon attorney by client's settlement, see ATTORNEY AND CLIENT.
Subscription to corporate stock, see CORPORATIONS, 2, 3.
Annulment of marriage for, see MARRIAGE, 2-4.
Of vendor avoiding contract of sale of land, see VENDOR AND PURCHASER, 21.

**FRAUDS, STATUTE OF:**

Validity of oral authority to execute contract of sale, see BROKERS, 4.
Parol partition, see PARTITION.
Specific performance of contracts partly performed, see SPECIFIC PERFORMANCE, 1.
Validity of oral trusts, see TRUSTS.

1. FRAUDS, STATUTE OF—EMPLOYMENT OF BROKER—MEMORANDUM—SUFFICIENCY. A memorandum of an agreement for the employment of a broker to sell real estate is insufficient, under the statute of frauds (Rem. & Bal. Code, § 5289), where it fails to name any broker or agent and employs none, describes no real estate, and contains no agreement for compensation. *Swartswood v. Naslin* 287

2. FRAUDS, STATUTE OF—ORAL LEASE—PART PERFORMANCE. An unacknowledged lease for a logging right of way, for a period of ten years, for a small annual rental, is taken out of the operation of the statute of frauds by part performance, where the lessee went into possession, built its road at a cost of $40,000, and complied with a contemporaneous agreement (which was the consideration for the lease) by clearing the land and a stream, and building fences and a bridge, involving the expenditure of a large amount of money, and increasing the rental value of the land. *Koschnitzky v. Hammond Lumber Co.* ..... 320

**FUNDS:**

Accident fund of city, see MUNICIPAL CORPORATIONS, 28.

**FUTURE ADVANCES:**

See CHATTEL MORTGAGES, 1.

**FUTURE PAIN:**

See DAMAGES, 1.

**GIFTS:**

Between husband and wife, see HUSBAND AND WIFE, 4.
Grant of pay to veterans, see PENSIONS.

**GOOD FAITH:**

See VENDOR AND PURCHASER, 1-4.

**GUARANTY:**

See INDEMNITY.

**GUARDIANS:**

Service on, for infant heirs, see EXECUTORS AND ADMINISTRATORS, 4.
As parties defendant, see PARTIES, 2.

**HARMLESS ERROR:**

In civil actions, see APPEAL AND ERROR, 23-34.

**HEARING:**

On appeal, see APPEAL AND ERROR, 19.

**HEIRS:**

As necessary parties to appeal, see APPEAL AND ERROR, 12.

**HIGHWAYS:**

Loss of highway by prescription, see ADVERSE POSSESSION.
Right to control, see COUNTIES.
Defects or obstructions in city streets, see MUNICIPAL CORPORATIONS, 9-11, 22-26.
Tax for state aid road, see TAXATION, 2.

1. HIGHWAYS—PRESCRIPTIVE USE—ESSENTIALS. Rem. & Bal. Code, § 5657, declaring public highways that have been used for seven years to be lawful roads, where the same have been kept up at public expense, is only a statute of limitations, and has no application where the road has not been kept up at public expense. *State v. Seattle* ..... 602

**HOLDER IN GOOD FAITH:**

See BILLS AND NOTES.

**HOMESTEAD:**

Rights of spouse in Federal homestead, see HUSBAND AND WIFE, 5.

1. HOMESTEADS — EXEMPTION — DETACHED TRACTS — STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 528, defining a homestead as the dwelling house in which the claimant resides and the land on which the same is situated, to be selected as in the act provided, and Rem. & Bal. Code, § 552, providing that lands and tenements, not exceeding in value two thousand dollars, actually intended and used exclusively for a home may be selected, a homestead may consist of lots in one block upon which the dwelling is situated, and lots in an adjoining block, separated from the dwelling and by an alley, used as a garden, orchard, and chicken run. *Morse v. Morris* ..... 43

**HOSPITALS:**

Hospital and medical treatment of employee, see MASTER AND SERVANT, 1.

## HUSBAND AND WIFE:

Divorce and judicial separation, see DIVORCE.
Estoppel of husband to assert title, see ESTOPPEL, 2.
Unlawful detainer by, see LANDLORD AND TENANT, 2.
Marriage and annulment thereof, see MARRIAGE.
Rights of insane wife, see SUBROGATION.

1. HUSBAND AND WIFE—PROPERTY—DOMICILE. The law of the domicile controls personalty acquired during coverture. *Colpe v. Lindblom* ..... 106

2. HUSBAND AND WIFE—COMMUNITY PROPERTY—ACQUISITION IN ANOTHER STATE—WHAT LAW GOVERNS—PRESUMPTIONS. Where a husband and wife, married in Arizona seventeen years ago, were keeping house at Nome, Alaska, where his earnings were his separate property, and there was nothing to show whether Nome was their domicile or merely their temporary abode, it will be presumed that the domiciliary law was the same as our own, and that the property was community property. *Colpe v. Lindblom*..... 106

3. HUSBAND AND WIFE—CONTRACTS—VENDOR AND PURCHASER—RATIFICATION BY WIFE. The execution of a deed by the wife, within the time required by a contract of sale made by the husband alone, ratifies the contract and renders it binding on the vendee. *Heinemann v. Sullivan*..... 346

4. SAME—DEED OF TRUSTEE TO WIFE—EFFECT. Where a trustee held the title to community property, who, at the husband's request, executed a deed to the wife, the husband's community interest is not divested by his subsequent delivery of the deed to the wife with intent to invest her with a separate estate; since that could only be done by his deed. *Carpenter v. Brackett*..... 460

5. HUSBAND AND WIFE—COMMUNITY PROPERTY—PUBLIC LANDS—FEDERAL HOMESTEAD—STATES—SOVEREIGNTY. Under Rem. & Bal. Code, §§ 5915-5917, a homestead acquired from the Federal government by a married man during the lifetime of his wife is community property; and the state has the sovereign power to fix its character irrespective of Federal statutes. *Curry v. Wilson*..... 509

6. HUSBAND AND WIFE—COMMUNITY PROPERTY—INCUMBRANCES. A promise by a husband to pay rent is not an incumbrance of community real estate, within Rem. & Bal. Code, § 5918, providing that the husband cannot incumber the same without the wife's consent. *Monroe v. Stayt*..... 592

7. HUSBAND AND WIFE—COMMUNITY PROPERTY—DESCENT—RIGHTS OF SURVIVOR—CONVEYANCE BY. Upon the death of the wife, leaving children, a deed by the surviving husband purporting to convey the entire community property, which descended one-half to him and one-half to the children, is not void, but is effectual to convey his one undivided one-half interest, which on the wife's death became his separate property. *Duvall v. Healy Lumber Co*..... 446

HUSBAND AND WIFE—CONTINUED.

8. HUSBAND AND WIFE—COMMUNITY PROPERTY—CONVEYANCES—DIVISION—EVIDENCE—SUFFICIENCY. The evidence sustains findings that a husband and wife, on making a division of their property, pending a divorce, intended that the wife should be given title to certain community property, where it appears that the title thereto had been in a trustee, who, at the husband's request, had made a deed to the wife some months before the settlement, the husband retaining possession of the deed; that deeds of other property passed between the parties on making the division, at which time the husband handed the trustee's deed to the wife, and subsequently it was recorded at the husband's request; that subsequent to the division he pointed out the property as belonging to the wife and thereafter paid no taxes thereon, and stood by while she erected a house on one of the lots. *Carpenter v. Brackett*..... 460

9. HUSBAND AND WIFE—SEPARATION—DIVISION OF PROPERTY—AFTER DIVORCE—EQUITY—JURISDICTION. Where the husband and wife made a division of their property pending a divorce, and the husband agreed and attempted to vest the wife with title to certain lots by delivering a previously executed trustee's deed, and surrendered possession to her and acquiesced in and acknowledged her ownership, in a suit in quity in which the question of title is submitted, the court has jurisdiction, after divorce granted, to decree specific performance of the contract, by compelling the husband to deed the property to the wife. *Carpenter v. Brackett*..... 460

10. HUSBAND AND WIFE—ACTIONS—JUDGMENT—VALIDITY—WAIVER OF ERROR. Where a husband and wife, represented by counsel, are entitled to a judgment on a verdict relieving their property from a special assessment, but a different judgment is entered upon the stipulation of the husband alone, the same is not void, but merely erroneous, and the wife cannot complain where she did not move to correct it, or appeal therefrom. *James v. Seattle*..... 318

**IMPROVEMENTS:**

Public improvements, see MUNICIPAL CORPORATIONS, 8-21.

**INCOMPATIBILITY:**

As ground for divorce, see DIVORCE, 3.

**INCUMBRANCES:**

See CHATTEL MORTGAGES; HUSBAND AND WIFE, 6.
Breach of covenants against, see COVENANTS.

**INDEMNITY:**

Attempt to show, see TRIAL, 13.

1. INDEMNITY—MORTGAGES—CONSTRUCTION. A mortgage given to a bonding company to secure against loss on an indemnity bond of the mortgagor, a building contractor, or upon any other bonds which he

EVIDENCE—CONTINUED.

3. EVIDENCE—PAROL TO VARY WRITING. Evidence to show that a contract had been partly performed, and part payment made before it was reduced to writing, is not inadmissible as varying by parol the terms of a written agreement. *Harstad v. Olson*..... 264

4. EVIDENCE — DEEDS — AMBIGUITY — INTENT — EXTRINSIC EVIDENCE. Where a deed granted blocks and lots designated in an upland plat which overlapped tide lands belonging to and afterwards platted by the state, there is a doubt or ambiguity in the deed as to the grantor's intent to include the tide land portion of the blocks and lots mentioned; since the upland plat was void as to such portions; and extrinsic evidence of the circumstances is admissible to show the intent. *Cook v. Hensler*..... 392

5. EVIDENCE—EXPERTS—QUALIFICATION—OPINIONS. A witness is not qualified to give an opinion as to the value of real estate along a certain street from the fact that he had lived in the city eight years and had been in the real estate business, where it was not shown that he had bought or sold property along the street or was otherwise familiar with values there or elsewhere in the city. *In re Western Avenue*..... 290

EXCEPTIONS:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 8-11.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see APPEAL AND ERROR, 16-18.

EXECUTION:

1. EXECUTION—INVALID WRIT—INJUNCTION—REMEDY AT LAW. A party whose property is seized on an invalid writ of execution has his choice of remedies, and the fact that he has a remedy at law to quash the execution or recover the property, will not bar his remedy in equity by injunction, since it is more speedy and efficacious to obviate a lien pending trial on the merits. *Cline Piano Co. v. Sherwood*..... 239

EXECUTORS AND ADMINISTRATORS:

Parties on appeal from final distribution, see APPEAL AND ERROR, 12.

1. EXECUTORS AND ADMINISTRATORS—NECESSITY FOR ADMINISTRATION —LIMITATIONS—DESCENT AND DISTRIBUTION. Under Rem. & Bal. Code, § 1366, providing that the fee title to lands shall vest in the heirs or devisees immediately upon the death of the ancestor, subject to debts, and § 1368, providing that no real estate shall be liable for the ancestor's debts unless letters be granted within six years after his death, administration upon community real estate is not necessary thirteen years after the death of the wife. *Duvall v. Healy Lumber Co*..... 446

EXECUTORS AND ADMINISTRATORS—CONTINUED.

2. EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—ORDER—EFFECT—WILLS—DESCENT AND DISTRIBUTION. Upon the probate of a will in favor of a husband, which was void as to the testator's children because they were not named or provided for in the will, a decree of final distribution awarding all the property to the husband, upon published notice as required by statute, is conclusive and binding upon the children, if unquestioned and unappealed from, notwithstanding Rem. & Bal. Code, § 1366, providing that upon the death of a person seized of lands, the title thereto shall vest immediately in his heirs or devisees. *In re Ostlund's Estate*..... 359

3. SAME—NOTICE OF APPLICATION FOR DISTRIBUTION. Under Rem. & Bal. Code, §§ 1499, 1500, and 1589, personal notice to the heirs is not necessary to confer jurisdiction upon the court to enter a final order of distribution which is binding and conclusive on them, although erroneous. *In re Ostlund's Estate*..... 359

4. EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—JURISDICTION—PROCESS—INFANTS—SERVICE ON GUARDIAN. A decree of distribution of an estate cannot affect the interests of a minor unless jurisdiction over him be acquired by service of notice upon his general guardian, if he have one, and if not, then by the appointment of a guardian *ad litem*. *Horton v. Barto*..... 477

5. SAME—JURISDICTION OVER HEIRS. Upon the distribution of an estate it is necessary to acquire jurisdiction over heirs or devisees of the deceased, or their descendants who died subsequently to the death of the deceased. *Horton v. Barto*..... 477

6. SAME—DISTRIBUTION—BONA FIDE PURCHASERS—INTERESTS NOT OF RECORD. A distributee upon final settlement of an estate, and his successors in interest, are not *bona fide* purchasers by reason of the fact that they had no notice of the interests of an heir which was not in the record chain of title; but they are bound to notice the interests of all who successively acquire title by inheritance or will. *Horton v. Barto*..... 477

7. EXECUTORS AND ADMINISTRATORS — ACTIONS — PARTIES—JOINDER—BONDS. The administrator of a deceased contractor, the principal on a bond, may, on rejection of the claim, be joined as a party defendant with the surety in an action on the bond; the proceedings for presenting claims against the estate and payment of judgments in course of administration making no difference in the nature of actions against administrators. *Spokane v. Costello*..... 183

8. SAME—JUDGMENT AGAINST ADMINISTRATOR—FORM. A judgment against an administrator should contain directions for its payment in course of administration, as required by Rem. & Bal. Code, § 1483, but failure to do so is not ground for reversal, where it can be so understood, or amended on appeal. *Spokane v. Costello*..... 183

JUDGMENT—CONTINUED.

Effect of payment of judgment to client on lien of attorney for fees, see ATTORNEY AND CLIENT.
On decree of divorce, see DIVORCE, 5.
Condemnation proceedings, see EMINENT DOMAIN, 19.
Estoppel by judicial record in general, see ESTOPPEL, 4-6.
In actions by or against administrators, see EXECUTORS AND ADMINISTRATORS, 8.
On stipulation, validity, see HUSBAND AND WIFE, 10.
Proceedings for mandamus, see MANDAMUS.
Foreclosure of mechanics' lien, see MECHANICS' LIENS, 5.
Against city on stipulation, validity, see MUNICIPAL CORPORATIONS, 6.
Decisions of land officers, see PUBLIC LANDS, 2.
In suits to quiet title, see QUIETING TITLE.
Collateral attack on probate of will, see WILLS, 1.

1. JUDGMENT—BY DEFAULT—VACATION. A misunderstanding between counsel, in which each acted in good faith, resulting in a default judgment, may be sufficient to warrant the court in opening the default, where the right to trial on the merits is not denied. *Coleman v. Security Savings Society*..... 675

2. JUDGMENT — COLLATERAL ATTACK — SERVICE — PROOF — BURDEN OF PROOF. In a collateral attack upon a judgment for want of service of process, it is immaterial that there was no proper proof of the genuineness of the defendant's written admission of service, where the court found that personal service was made, the burden being upon defendant to establish want of service, and not want of proper proof of service. *Merz v. Mehner*..... 324

3. JUDGMENTS—BAR—CONTRACTS—PARTIAL PERFORMANCE — RECOVERY ON SEVERABLE CONTRACT. Where a contract for clearing land is severable, an action for the first installment, falling due on completing the first acre, is not a bar to a recovery for the balance. *Harstad v. Olson* ..... 264

4. JUDGMENT—BAR—MATTERS CONCLUDED—BOUNDARIES—ELECTION OF REMEDIES. A judgment establishing a disputed boundary line is a bar to a subsequent action of ejectment brought by the same plaintiff against the defendants to recover a strip along the boundary line by right of adverse possession, since the plaintiff elected his remedy in the former action and alleged ownership of the respective parties up to the line, a government subdivision. *Struntz v. Hood*..... 578

5. JUDGMENTS—CONCLUSIVENESS—RECITALS—PARTIES BOUND—STRANGERS. The rule that recitals in a judgment are not subject to collateral attack where the court had jurisdiction, and there is nothing in the record to contradict the recitals, has no application as to strangers to the record not parties or privies; hence, where a tax title holder conveyed and warranted the title, his grantee, in an action on the covenant, may show failure of title by reason of defects in the summons. *Craver v. Mossbach*..... 662

**JUDICIAL NOTICE:**

In civil actions, see EVIDENCE, 1.

**JUDICIAL SALES:**

Of property in hands of receiver, see RECEIVERS.

**JURISDICTION:**

Criminal prosecutions, see CRIMINAL LAW, 5-6.

**JURY:**

Right to trial by, see REFERENCE, 1.
Instructions in civil actions, see TRIAL, 6-11.
Taking case or question from jury at trial, see TRIAL, 5.

1. JURY—BIAS—QUALIFICATIONS—DISCRETION OF COURT. In a prosecution for the infringement of a labor union trade-mark, prejudice of a juror is not shown and it is not an abuse of discretion to overrule a challenge for cause, where the juror was not acquainted with the defendant, knew nothing of the case, and was not a member of any union, although he had been a member and was favorably inclined towards unions. *State v. Montgomery*..... 192

**JUSTICES OF THE PEACE:**

Criminal prosecutions, see CRIMINAL LAW, 5, 6.
Conviction as former jeopardy on appeal, see CRIMINAL LAW, 1.

**JUSTIFICATION:**

Of actionable words, see LIBEL AND SLANDER.

**KNOWLEDGE:**

Master's knowledge of defects in tools and appliances or dangers incident to employment, see MASTER AND SERVANT, 12, 13.

**LACHES:**

See ADVERSE POSSESSION, 1; TRUSTS, 1.
Delay in moving against sale, see RECEIVERS, 1.
To rescind contract for sale of land, see VENDOR AND PURCHASER, 12-14.

**LANDLORD AND TENANT:**

Requirements of statute of frauds as to leases, see FRAUDS, STATUTE OF, 2.
Mechanic's lien for improvements by tenant, see MECHANICS' LIENS, 3-5.

1. LANDLORD AND TENANT—LEASE—ASSIGNMENT. A contract to transfer a lease by a good title is provisional where the assignee knows that the lease contains a clause prohibiting assignment without consent of the landlord. *Merritt v. Lillybalde*..... 159

LANDLORD AND TENANT—CONTINUED.

2. LANDLORD AND TENANT—ESTOPPEL TO DENY TITLE—UNLAWFUL DETAINER—HUSBAND AND WIFE—COMMUNITY RELATION. Where premises leased by a husband alone were occupied by the husband and wife and rent paid for the full term, the wife is estopped, as a member of the community, from disputing the title of the landlord, in an action for unlawful detainer, notwithstanding that the community relation was not considered in making the lease and that she did not sign the lease. *Monroe v. Stayt*..... 592

3. LANDLORD AND TENANT—UNLAWFUL DETAINER—TITLE OF PLAINTIFF. The title of the plaintiff cannot be tried out in an action of unlawful detainer of demised premises. *Monroe v. Stayt*..... 592

4. LANDLORD AND TENANT—FORCIBLE ENTRY AND DETAINER—STATUTE—CONSTRUCTION. Provisions as to the time and manner of bringing the special proceeding of forcible entry and detainer against a tenant are to be strictly construed and the provisions of the general practice act for service by mail are not applicable. *Smith v. Seattle Camp No. 69, Woodmen of the World*..... 556

5. SAME—NOTICE TO QUIT—SERVICE—WHEN COMPLETE—PREMATURE ACTION. Under Rem. & Bal. Code, § 812, making a tenant guilty of unlawful detainer if notice to quit or pay rent remains uncomplied with for the period of three days after service thereof, and § 814, providing for service of notice on a corporation, if no one is found on the premises, by posting a notice thereon and "sending a copy through the mail," addressed to the corporation, etc., service is not complete until the copy mailed is received by the corporation, as the statute contemplates three full days within which to comply with the notice; hence where a copy is mailed January 2, and not received until Monday, January 4, an action commenced January 6, is premature, and tender of rent on that day is in time. *Smith v. Seattle Camp No. 69, Woodmen of the World*..... 556

6. LANDLORD AND TENANT—UNLAWFUL DETAINER—WHEN LIES—DEEDS—ORAL RESERVATIONS—EVIDENCE—ADMISSIBILITY. Where premises are conveyed by deed absolute in form, the grantor remaining in possession under an oral agreement to pay a monthly rental, the conventional relation of landlord and tenant exists, making the summary proceeding by unlawful detainer available, and it is incompetent for the grantor to show by parol a reservation or limitation whereby it was orally agreed that the grantor was to retain an interest and possession for the period of one year upon making the monthly payments. *Oregon & Washington R. Co. v. Vulcan Iron Works*..... 372

7. SAME—TENANCY FROM MONTH TO MONTH—TERMINATION. Such a holding is a tenancy from month to month, under Rem. & Bal. Code, § 8803, and may be terminated at the end of any month by giving the statutory notice. *Oregon & Washington R. Co. v. Vulcan Iron Works*..... 372

LANDLORD AND TENANT—CONTINUED.

8. LANDLORD AND TENANT—UNLAWFUL DETAINER—NOTICE TO QUIT—SUFFICIENCY. A notice to quit under the unlawful detainer act, Rem. & Bal. Code, § 812, subdiv. 2, is not objectionable in that it purports to terminate the tenancy on the last day of the month rather than on the date the notice was given, to take effect at the end of the month. *Newman v. Worthen*..... 467

9. SAME. A notice to quit a monthly tenancy expiring at the end of the month, may properly notify the tenant to vacate on the last day of the month instead of at the end of the month, where it was served twenty days prior thereto. *Newman v. Worthen*..... 467

10. SAME—DEFENSES—TENDER OF RENT. Under a tenancy from month to month, tender of rent for the months of May and June before the commencement of the action is no defense to the action of unlawful detainer upon proper notice terminating the tenancy at the end of the month of April. *Newman v. Worthen*..... 467

11. SAME—DOUBLE DAMAGES. Rem. & Bal. Code, § 827, requires judgment to be entered in unlawful detainer of leased premises, for double the sum found as damages for the unlawful detention. *Newman v. Worthen*..... 467

**LANDS:**

See PUBLIC LANDS.

**LASCIVIOUS COHABITATION OR CONDUCT:**

See LEWDNESS.

**LEASES:**

See LANDLORD AND TENANT.
Oral leases as within statute of frauds, see FRAUDS, STATUTE OF.

**LEGISLATURE:**

Motive of, see STATUTES, 1.

**LESSEE:**

Relation of independent lessee, see PRINCIPAL AND AGENT, 1.

**LETTERS:**

Preliminary evidence as to authenticity, see EVIDENCE.

**LEWDNESS:**

1. LEWDNESS — EVIDENCE — REPUTATION OF PARAMOUR—WITNESSES—FORM OF QUESTION. In a prosecution for lewdness, a question as to the "reputation" for chastity of the defendant's paramour, means when unqualified, *ex vi termini*, "general reputation," and is not objectionable in form. *State v. Poyner*..... 489

LEWDNESS—CONTINUED.

2. SAME—ADMISSIBILITY. In a prosecution for lewdness, the general reputation of the defendant's paramour is relevant and material. *State v. Poyner*..... 489

3. LEWDNESS—OFFENSE—NOTORIETY—STATUTES—CONSTRUCTION. Under the statutory offense of lewdness, Rem. & Bal. Code, § 2901, for a man and woman, not being married to each other, to lewdly and viciously associate and cohabit together, it is not necessary that the acts be open and notorious or that the parties should hold themselves out as husband and wife. *State v. Poyner*..... 489

**LIBEL AND SLANDER:**

1. LIBEL AND SLANDER—CRIMINAL PROSECUTION—DEFENSES—TRUTH OF CHARGE—COMMON LAW. At common law, which prevails in this state except as modified by statute, the truth of a libelous charge was not a defense to a criminal prosecution. *State v. Mays*.... 540

2. SAME—STATUTES — EVIDENCE OF TRUTH — ADMISSIBILITY. Under Rem. & Bal. Code, § 2157, providing that the truth of a criminal libel may be given in evidence, and the accused shall be acquitted if the jury find that the matter charged was a crime punishable by fine or imprisonment, and was true, and published with good motives and justifiable ends, the truth is available as a defense only where such a crime was charged with good motives, etc.; and the right to give evidence of the truth is limited to such cases. *State v. Mays* 540

3. SAME — "DEFAMATION" — FALSITY OF CHARGE. "Defamation" as used in Rem. & Bal. Code, § 2777, defining criminal libel does not imply that the defamatory words are false, as the statute is simply declaratory of the common law in which the truth of the charge was no defense. *State v. Mays*..... 540

**LICENSES:**

For fishing, see FISH.
Physicians and surgeons, see PHYSICIANS AND SURGEONS, 2, 3.

**LIENS:**

Lien of attorney for compensation, see ATTORNEY AND CLIENT.
Mortgage, see CHATTEL MORTGAGES.
Liens of mechanics and materialmen, see MECHANICS' LIENS.
Mortgage liens, see MORTGAGES.
Parties in action to foreclose, see PARTIES, 3.
Tax lien, see TAXATION.

**LIMITATION OF ACTIONS:**

See ADVERSE POSSESSION.
Change in statutes of limitation as impairing vested rights, see CONSTITUTIONAL LAW.
Breach of covenant, see COVENANTS, 1.

LIMITATION OF ACTIONS—CONTINUED.

Time to administer upon real estate, see EXECUTORS AND ADMINISTRATORS, 1.
Time for application for new trial, see NEW TRIAL, 1, 2.
Time to move against receiver's sale, see RECEIVERS, 1.
Action by owner to set aside tax proceedings, see TAXATION, 9, 12.
Vendee rescinding sale of land, see VENDOR AND PURCHASER, 9.
Probate proceedings, see WILLS, 2.

1. LIMITATION OF ACTIONS—ACCRUAL—VENDOR AND PURCHASER—CONTRACT TO CONVEY. Where the rights of the parties are fixed by a written contract requiring a grantee to reconvey a one-half interest to the grantor on the payment of specified sums, the grantor's right of action on the contract accrues when the grantee gives a written notice abrogating the contract for the default of the grantor, and is barred six years thereafter. *Gasaway v. Ballin*..... 355

2. LIMITATION OF ACTIONS—RECOVERY OF REAL ESTATE—PARTITION—ACCOUNTING. An action for the partition of real property and an accounting, brought by children not named in their mother's will (which devised the property to her husband) is barred by the statute of limitations when not commenced until more than ten years after the husband deeded the lands and surrendered possession to the defendants. *Pilcher v. Lotzgesell*..... 471

**LIQUIDATED DAMAGES:**

See DAMAGES, 2, 3.

**LIVE STOCK:**

Carriers of, see CARRIERS.

**LOCAL ASSESSMENTS:**

For local improvements, see MUNICIPAL CORPORATIONS, 12-21.

**LOCAL SELF-GOVERNMENT:**

See COUNTIES.

**LOCATION:**

Of mining claim, see MINES AND MINERALS.

**LODES:**

See MINES AND MINERALS.

**LOGS AND LOGGING:**

1. LOGS AND LOGGING—TIMBER—SALE—REMOVAL. Where a deed of all standing and lying timber contained an agreement that the grantee shall have three years from and after its date within which to "remove the timber," the grantee's interest ceases as to all timber not removed after that date, which then reverts to the grantor;

LOGS AND LOGGING—CONTINUED.

since the intent of the parties controls the construction irrespective of distinctions between covenants and forfeitures or other technical questions. *Allen & Nelson Mill Co. v. Vaughn*..... 163

2. LOGS AND LOGGING—SALE OF TIMBER—EXECUTION—EVIDENCE—SUFFICIENCY. Whether there was a contract for the sale of timber is for the jury, where the evidence was conflicting and one of the parties testified to the making of the contract, after all other negotiations had failed, and it appeared that he gave a check for the amount to be paid, indorsed on the face "payment in full for all timber" on the tract in question, which check was cashed. *Haines & Spencer v. Kelley* ..... 219

3. LOGS AND LOGGING — EMINENT DOMAIN — PARTIES PLAINTIFF — JOINDER—ALLIED CORPORATIONS. A boom company at the mouth of a river, and a driving company floating down logs by splash dams and artificial freshets, may properly join as parties plaintiff in an action to condemn overflowed lands, where it appears that the overflow is caused by the concurrent acts of the driving company in creating the freshets and of the boom company in choking the mouth of the river with logs and retarding the current, and both companies are jointly interested in gathering and holding logs in the river. *State ex rel. Grays Harbor Boom Co. v. Superior Court* 71

4. LOGS AND LOGGING—EMINENT DOMAIN—PLATS—EFFECT—STATUTE—CONSTRUCTION. Rem. & Bal. Code, § 7121, providing that a driving company shall file a plat of any of the rivers and lands contiguous thereto as are proposed to be appropriated, does not prevent a company from condemning the right to damage by artificial freshets lower lands outside of the plat, where the company was not seeking to improve the river or exercise its granted powers at the point where the injury occurs; as the object of the act was that of notice to riparian owners where the improvements were to be made. *State ex rel. Grays Harbor Boom Co. v. Superior Court*..... 71

5. SAME. "Contiguous lands" in such act is not to be restricted to lands "next to" or "touching" the river. *State ex rel. Grays Harbor Boom Co. v. Superior Court*..... 71

LOST INSTRUMENTS:

Secondary evidence of contents, see EVIDENCE, 2.

LUMBER:

See LOGS AND LOGGING.

MANDAMUS:

Order refusing to quash, see APPEAL AND ERROR, 1.

1. MANDAMUS—PEREMPTORY WRIT—FORMAL JUDGMENT—NECESSITY. A peremptory writ of mandamus, on sustaining a demurrer to the

MANDAMUS—CONTINUED.

application, upon findings and conclusions, issued prior to the entry of formal judgment, is premature; since the proceeding has all the elements of a civil action, and the statute provides for judgment on the issues distinct from the writ issued to enforce it. *State ex rel. Billings v. Lamprey*..... 84

MARKETABLE TITLE:

See VENDOR AND PURCHASER, 16.

MARRIAGE:

1. MARRIAGE — VALIDITY — FIRST COUSINS — STATUTES — EXTRATERRITORIAL FORCE. A marriage between first cousins domiciled in Seattle, contracted in Victoria, B. C., where they went to evade the law of this state prohibiting such marriages, the parties immediately returning to their domicile, is void, and it is error to refuse a decree of divorce therefrom. *Johnson v. Johnson*..... 89

2. MARRIAGE—ANNULMENT—FRAUD—STATUTES. Rem. & Bal. Code, § 7162, authorizing the annulment of a marriage for fraud is merely jurisdictional and refers to the force or fraud of the unwritten law of marriage contracts. *Thorne v. Farrar*..... 441

3. SAME—DURESS—EVIDENCE—SUFFICIENCY. Duress as ground for annulment of a marriage must be shown by clear, satisfactory, and convincing evidence; and the evidence is insufficient where it appears that the plaintiff, a young man 26 years of age, upon demand of an attorney and a police officer, accompanied them to defendant's home, where he was charged with the paternity of defendant's unborn child, and threatened by defendant's mother with a criminal prosecution if he refused to marry; that he then agreed to meet them the next morning to go to another city and marry the defendant, which arrangement was carried out; that he did not see the officer or attorney after the agreement and had ample time before the marriage to consult relatives or an attorney; and that at the trial he exercised his privilege of refusing to answer as to whether he had carnally known the defendant, and was apparently persuaded to marry by the promptings of conscience rather than by threats of prosecution. *Thorne v. Farrar*..... 441

4. SAME—DURESS—CHARGE OF SEDUCTION—PROBABLE CAUSE. A marriage entered into by a man in order to secure his release from arrest on a charge of seduction will not be annulled on the ground of duress, where the charge was not made maliciously or without probable cause, and he did not aver and prove the fasity of the charge. *Thorne v. Farrar*..... 441

MARRIED WOMEN:

See HUSBAND AND WIFE.

**MASTER AND SERVANT:**

Liability of city to employee for negligence, see MUNICIPAL CORPORATIONS, 26.

Relation of independent lessee, see PRINCIPAL AND AGENT, 1.

Release of liability of master, see RELEASE.

1. MASTER AND SERVANT—SELECTION OF PHYSICIAN FOR EMPLOYEE—LIABILITY OF MASTER. Where an employer withholds one dollar a month from the wages of employees and pays the same to a physician or surgeon selected by the employer to attend injured employees, he only owes the duty to use reasonable care in the selection of a competent surgeon, and is not liable for the negligence of the surgeon. *Wells v. Ferry-Baker Lumber Co*..... 658

2. MASTER AND SERVANT—SAFE PLACE—DUTY OF MASTER—INSTRUCTIONS. An instruction that the master owes the "positive" duty to provide its employees with a reasonably safe place to work is not objectionable as making the master an insurer. *Harris v. Brown's Bay Logging Co*..... 8

3. MASTER AND SERVANT—SAFE PLACE—INSPECTION—DUTY OF SERVANT—INSTRUCTIONS. Where a brick mason was injured by the fall of a projecting wall upon which he was set to work, the first course of the projection having been laid by other masons as a stretcher course instead of a header course, he cannot recover because of the employer's duty to furnish him a safe place in which to work, and failure to give notice of the danger, if by the exercise of reasonable care he would have discovered the defect; and instructions sufficiently cover the point where the jury are told that he had a right to assume that the place for work was reasonably safe, and was not bound to anticipate danger or make an inspection, in the absence of knowledge of the defect or such notice as would lead him in the exercise of due care to such knowledge. *Soderburg v. Wells*.... 281

4. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—EXCAVATIONS—QUESTION FOR JURY. The negligence of an employer resulting in the death of an employee from the caving in of a trench, is for the jury, where he was directed to work in the trench seven or eight feet deep, the sides of which were not braced as was usual and customary, and that a fellow servant directed the foreman's attention to a crack in the wall opposite the servant's working place a few minutes before the accident, and the foreman did not warn the servant or take any steps to protect him. *Anustasakas v. International Contract Co*..... 453

5. MASTER AND SERVANT—NEGLIGENCE—OBEYING DIRECTIONS. A direction to a laborer to work in a certain place in a trench, impliedly assures its safety, and directs him to "stay" until the work is completed. *Anustasakas v. International Contract Co*..... 453

6. MASTER AND SERVANT — SCOPE OF EMPLOYMENT — INSTRUCTIONS. Upon an issue as to whether a laborer in a trench unnecessarily

MASTER AND SERVANT—CONTINUED.

stayed therein after completion of the work, an instruction that there could be no recovery if he stayed an unreasonable length of time after completion of the work, is as favorable to the defendant as the facts would warrant. *Anustasakas v. International Contract Co.* ..... 453

7. MASTER AND SERVANT—DEFECTIVE APPLIANCE—PROMISE TO REPAIR—PLEADING AND PROOF—VARIANCE. It is not a failure of proof to allege the promise of the master to furnish a new snap line on a donkey engine and that the line complained of broke and injured the plaintiff, and to prove that the line which broke was not in use at the time of the promise, but was a defective line substituted by the master. *Alkire v. Myers Lumber Co.* ..... 300

8. MASTER AND SERVANT—DEFECTIVE APPLIANCE—PROMISE TO REPAIR—PERFORMANCE OF PROMISE—EVIDENCE—SUFFICIENCY. As a promise to repair need not be in express words, the evidence is sufficient to show a promise to repair a defective snap line, where it appears that complaint was made of the "rigging," which included the snap line, and the employer's manager replied that he had ordered or would order a "new line," and undertook to replace not only "the line" but the snap line also. *Alkire v. Myers Lumber Co.* ..... 300

9. SAME—PROMISE TO REPAIR—REASON FOR COMPLAINT. A complaint made by the engineer of a donkey engine as to a defective rigging, and that it was breaking every day and that some one would be killed by it, sufficiently shows that self-protection was the motive, as his position was in the zone of danger. *Alkire v. Myers Lumber Co.* ..... 300

10. SAME—PROXIMATE CAUSE. Upon the question of the contributory negligence of an employee knocked from a roller coaster track by a car, it is immaterial that he exposed himself to the danger of having his clothes caught on the chain, that not being the cause of the injury. *Wiemann v. Jackman R. Co.* ..... 682

11. MASTER AND SERVANT—CUSTOMARY ACTS—INSTRUCTIONS. It is not error to give an instruction as to the custom of not sending up a roller coaster car while a man was at work on the track, where several witnesses who had worked there testified that they never had known it to be done, especially in view of the evident danger in doing so. *Wiemann v. Jackman R. Co.* ..... 682

12. MASTER AND SERVANT—NEGLIGENCE—DUTY TO WARN—ISSUES—INSTRUCTIONS. Where a complaint charges negligence in directing a laborer to work in a trench, with knowledge that the walls were unsafe, an instruction relative to the duty of the master to give warning upon receiving notice of the unsafety of the walls is not objectionable as not being in harmony with the complaint. *Anustasakas v. International Contract Co.* ..... 453

MASTER AND SERVANT—CONTINUED.

13. MASTER AND SERVANT—NEGLIGENCE—WARNING—INSTRUCTIONS. In an action for personal injuries sustained by a longshoreman engaged in loading a lumber schooner, where the master, for the purpose of hastening the work, had assumed the burden of warning servants of the approach of a loaded sling, and the men were required to rely on the warning, it is proper to refuse any requested instruction which told the jury that the workmen must rely on their own resources to protect themselves, and not on the warning. *Anderson v. Globe Navigation Co.*..... 502

14. MASTER AND SERVANT—FELLOW SERVANTS—POWDERMAN AND LABORER—RULE IN ANOTHER STATE—RECOVERY. Under the decisions of the supreme court of Idaho, and the laws of that state, a foreman and powderman engaged in blasting and drilling operations at the top of a cut in railroad construction work in that state, are fellow servants of a common laborer engaged in shoveling rock and earth in the cut below; and no recovery can be had against the master in this state for negligence of the fellow servants. *Ongaro v. Twohy* 668

15. MASTER AND SERVANT—ASSUMPTION OF RISKS—KNOWN DANGERS—EVIDENCE—SUFFICIENCY. A member of a gang on a tower car putting up a trolly wire, who admitted that he was familiar with the work and appreciated all the dangers, assumes the risks and a nonsuit is proper, where it appears that in the hurry to get out of the way of a passenger train, two mast arms were skipped, leaving three hundred feet of wire hanging from the spool, which was liable to slip at any time, that it slipped, causing plaintiff to lose his balance and involuntarily seize a live wire about three feet distant, which severely burned the plaintiff when the other wire sagged to the ground. *Shore v. Spokane & Inland Empire R. Co.*..... 212

16. SAME—CAUSE OF ACCIDENT. In such a case it is immaterial whether or not the foreman negligently directed the man at the brake on the spool to slack the wire, where the uncontradicted testimony showed that any such order, if given, was not obeyed. *Shore v. Spokane & Inland Empire Co*..... 212

17. SAME—ASSUMPTION OF RISKS—PROMISE—IMMINENT DANGERS. An engineer of a donkey engine who complained of a defective cable, and was promised a new one, does not assume the risks on continuing the work, on the theory that the danger is imminent, apparent, and pending; since the promise is an agreement that the master should temporarily assume the risk. *Alkire v. Myers Lumber Co.*..... 300

18. MASTER AND SERVANT—ASSUMPTION OF RISKS—EXCAVATIONS—UNKNOWN DANGERS. It cannot be said that a laborer in a trench seven or eight feet deep assumes the risk of a cave-in of unbraced walls, as a matter of law, where the master's evidence was directed to

MASTER AND SERVANT—CONTINUED.

proving that it was not customary to brace the walls in excavations in soil of that character, and the master had directed the servant where to work, and impliedly assured the safety of the place. *Anastasakas v. International Contract Co.*..... 453

19. SAME—ASSUMPTION OF RISKS—FAILING TO WARN. A longshoreman engaged in loading a lumber schooner does not assume the risks of negligence of the mate in failing to give warning of the approach of a sling load, where the mate supervised the work and tended hatch, and the workmen had to rely upon his giving the signals. *Anderson v. Globe Navigation Co.*..... 502

20. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE — APPARENT DANGERS—QUESTION FOR JURY. A section hand is not guilty of contributory negligence, as a matter of law, and does not have equal knowledge with the company as to the liability of a train of cars to strike a skid used to load a donkey engine and left near the track, where he testified that he did not know of the fact, he had worked for the company but a few hours, and knew nothing of the manner in which logs were loaded on the cars, while the foreman knew that it was liable to be struck by logs, although the engine could pass in safety. *Harris v. Brown's Bay Logging Co.*..... 8

21. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—OBVIOUS DANGERS—INSTRUCTIONS. Where the contributory negligence of a new section hand depended upon whether he had knowledge or might have known that a skid near the track was liable to be struck by a passing logging train, a fact known to the company, it is within the issues and proper to give an instruction as to the duties of the parties where they do not stand upon an equal footing as to the obvious or apparent dangers. *Harris v. Brown's Bay Logging Co.* 8

22. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—WARNING—RELIANCE UPON—QUESTION FOR JURY. The question of the contributory negligence of a longshoreman, engaged in the loading of a lumber schooner, in not taking a signal to hoist as a warning of the approach of a sling load, is for the jury, where it was customary for the hatch tender and his duty to give a direct warning to the longshoremen and for them to work rapidly in reliance thereon. *Anderson v. Globe Navigation Co.*..... 502

23. MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE — EVIDENCE OF CUSTOM—ADMISSIBILITY. Evidence that it was customary for all the longshoremen engaged in loading a lumber schooner to rely on the signal of the mate to warn them of the approach of the loaded sling is admissible upon the issue of plaintiff's exercise of due care in relying upon such warning being given. *Anderson v. Globe Navigation Co.*..... 502

24. SAME. In an action for injuries to an employee working upon a roller coaster track by being struck by a car, evidence that the at-

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tachment of a car to the chain would have given notice to one working on the chain does not show contributory negligence in not heeding the notice, where it does not appear that plaintiff had commenced work on the chain when the car was attached. *Wiemann v. Jackman R. Co.*..... 682

25. SAME—CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. An employee knocked from a roller coaster track by a car is not guilty of negligence contributing to his injury, by reason of having taken a position with his back to the car, when he could not have seen the car in time to have escaped the injury if he had been facing it. *Wiemann v. Jackman R. Co.*..... 682

26. MASTER AND SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY. The negligence of the defendants in sending a roller coaster car up an incline while an employee was working on the track, is for the jury, where there was evidence tending to show that the plaintiff was set to work there by the manager, who promised to take care of him while at work, but sent up a car contrary to custom, which was a very dangerous proceeding. *Wiemann v. Jackman R. Co.*. 682

27. SAME—TRIAL—REQUEST FOR INSTRUCTIONS. An objection that an instruction as to the duties of a master where he and the servant do not stand upon an equal footing is misleading in not further instructing that there can be no recovery if both are equally ignorant of a danger, can only be made where there was a request for the further instruction. *Harris v. Brown's Bay Logging Co.*..... 8

MATERIALITY:

Of alteration of written instrument, see ALTERATION OF INSTRUMENTS, 1.

MAXIMS:

Maxims of equity, see EQUITY.

MECHANICS' LIENS:

Parties in action to foreclosure lien, see PARTIES, 2, 3.

1. MECHANICS' LIENS—PERSONS ENTITLED—MACHINISTS—STATUTES—CONSTRUCTION. A plumber doing work upon a soda water fountain is not entitled to a lien under the provisions of Laws 1905, p. 137, § 1, giving a lien to blacksmiths, wagon makers, machinists, and boiler makers, expending labor on any chattel; as "machinist" does not include a plumber. *Modern Plumbing & Heating Co. v. American Soda Fountain Co.*..... 148

2. MECHANICS' LIENS — COMMINGLED MATERIALS — EVIDENCE — SUFFICIENCY. A materialman is not entitled to a lien upon a house for lumber furnished to a contractor who was also building another

MECHANICS' LIENS—CONTINUED.

house, where the lumber for the two houses was so commingled by the materialman that it was impossible to determine what particular part went into the house upon which the lien was claimed, and he was unable to comply with a demand for a segregated bill therefor. *Little Brothers Mill Co. v. Baker*..... 311

3. MECHANICS' LIENS — LEASEHOLDS — INTERESTS LIABLE — IMPROVEMENTS BY LESSEE—ESTOPPEL OF OWNER. While ordinarily the estate of the lessor is not subject to mechanics' liens for improvements made by the lessee, the owner is estopped to contest mechanics' liens for improvements made by a lessee, where it appears that the public records did not disclose the lessee's interest in the demised premises, that the owner knew of the lessee's bad reputation and inability to carry out his contracts and must have anticipated his failure and the forfeiture of the leasehold, that the owner was constantly about the building during the progress of the work giving orders, paying bills when necessary to retain carpenters, and assuring them that their bills would be paid, and knew that his warning notices were immediately torn down. *Shaw v. Spencer*..... 587

4. SAME. The same estoppel would apply to a lien for material furnished under an agreement that the owner was to pay one-fourth of the cost, which he did and received a release from further liability. *Shaw v. Spencer*..... 587

5. SAME—PERSONAL LIABILITY. In an action to foreclose a mechanics' lien for improvements made by a lessee, personal judgment cannot be rendered against the lessor, where he contracted none of the debts, although he had estopped himself from confining the liens to the leasehold interest of the lessee. *Shaw v. Spencer*..... 587

**MEDICAL TREATMENT:**

Of employee, see MASTER AND SERVANT, 1.

**MEMORANDA:**

Required by statute of frauds, see FRAUDS, STATUTE OF, 1.

**MINES AND MINERALS:**

1. MINES AND MINERALS — "VEINS"— DISCOVERY — EVIDENCE — SUFFICIENCY. There is sufficient evidence of the discovery of a vein of ore (understood by miners to be a body of mineral-bearing substance bounded on each side by the country rock, of varying width and length) where a miner testified that the deposit of ore was what he called a moraine ledge, and explained that the ledge was in permanent place but had been moved or shoved down with the whole country; since there appeared to be a well-defined ledge kept in place by country rock, even if the whole mountain had been moved to one side by some force of nature. *State v. Praul*..... 198

MINES AND MINERALS—CONTINUED.

2. MINES AND MINERALS — CLAIMS — RELOCATION—REQUISITES. Relocators of abandoned mining claims west of the summit of the Cascade mountains need not sink a discovery shaft, under Rem. & Bal. Code, § 7366, providing that the provisions of the act relating to discovery shafts shall not apply to any mining location west of the summit of the Cascade mountains; since said exception is not confined to §§ 7358 and 7359, prescribing the duties of the discoverers of an original claim and providing that he shall sink a discovery shaft, but applies also to § 7355 of the act which provides that the relocation of forfeited or abandoned quartz or lode claims shall only be made by sinking a new discovery shaft and fixing new boundaries as required in making a new location, or the relocator may sink the original discovery shaft ten feet deeper than it was (overruling *Id.*, 54 Wash. 617). *National Milling & Mining Co. v. Piccolo*..... 572

**MISCONDUCT:**

Of counsel, see TRIAL, 12-14.

**MISREPRESENTATION:**

Affecting validity of contract for sale of land, see VENDOR AND PURCHASER, 21.

**MISTAKE:**

In redemption certificate, see TAXATION, 4.

**MONEY RECEIVED:**

Recovery of price paid for land, see VENDOR AND PURCHASER, 18-21.

**MONTH:**

Tenancy from month to month, see LANDLORD AND TENANT, 7.

**MORTGAGES:**

Of personal property, see CHATTEL MORTGAGES.
Title obtained by foreclosure, see DEEDS, 1.
For indemnity, see INDEMNITY.
Subrogation in favor of mortgagee, see SUBROGATION.

1. MORTGAGES — FORECLOSURE — ATTORNEY'S FEES — REASONABLENESS. The sum of $1,000 is not an unreasonable attorney's fee in the foreclosure of an indemnity mortgage, although the total amount of the judgment was but $7,000, where the suit was strenuously resisted and the record was voluminous. *Fidelity and Deposit Co. v. Oliver* ..... 31

2. MORTGAGES—DEFAULT IN INTEREST—MATURING OF WHOLE DEBT—WAIVER. A provision in a mortgage that the whole debt shall become due in case of nonpayment of interest is waived if the mortgagee does not manifest intention to claim it prior to tender of the interest. *Gunby v. Ingram*..... 97

MORTGAGES—CONTINUED.

3. SAME—TENDER—AFTER ASSIGNMENT—NOTICE. Where a mortgagor had no notice of the assignment of the mortgage, tender of interest to the mortgagee is sufficient, and prevents exercise of an option to declare the whole debt due. *Gunby v. Ingram*..... 97

4. SAME—TENDER—BY CHECK—SUFFICIENCY. The mailing of a check for interest due on a mortgage is a sufficient tender to prevent the exercise of an option to declare the whole debt due, where all other payments of interest had been made by check, and no objection was made to the character of the money or specie tendered. *Gunby v. Ingram*..... 97

5. MORTGAGES—PAYMENT BY CHECK—EVIDENCE—SUFFICIENCY. The evidence sufficiently shows that previous payments of interest on a mortgage note had been made by checks, where the mortgagor so testified according to his best judgment and that such was his custom, the mortgagee did not testify, and there was no other evidence on the subject. *Gunby v. Ingram*..... 97

6. MORTGAGES — FORECLOSURE — DEED — AFTER-ACQUIRED TITLE. The mortgagor's after-acquired title inures to the benefit of the purchaser at the mortgage foreclosure, although the then owners of the title were not made parties to the foreclosure suit. *Gough v. Center* ..... 276

**MOTIONS:**

For new trial in civil actions, see NEW TRIAL, 1-4.

**MOTIVE:**

Of legislature, see STATUTES, 1.

**MUNICIPAL CORPORATIONS:**

Negligence in care of streets, evidence admissible, see APPEAL AND ERROR, 27.
Streets, adverse possession, see CONSTITUTIONAL LAW.
Ordinance, jurisdiction for violation, see CRIMINAL LAW, 5.
Liability for death caused by light plant, see ELECTRICITY.
Appropriation of land for highways, see EMINENT DOMAIN.
Change of grade of streets as damage, see EMINENT DOMAIN, 1.
Right to damages for change of grade of street, see STATUTES, 3.

1. MUNICIPAL CORPORATIONS — POWERS — PENAL ORDINANCES — CONFLICT WITH STATE LAWS. An ordinance providing a punishment for leasing a gambling house by fine not exceeding $300, or imprisonment not exceeding three months, is within the powers of a city of the third class, notwithstanding a state law on the same subject (Rem. & Bal. Code, § 2925) authorizing a fine for substantially the same act in a sum not exceeding $100, in view of Rem. & Bal. Code,

MUNICIPAL CORPORATIONS—CONTINUED.

§ 7685, authorizing the city to pass ordinances not in conflict with the laws of the state and to impose fines and penalties for the violation of ordinances not exceeding $300, or three months imprisonment. *State v. Hagimori* ..... 623

2. MUNICIPAL CORPORATIONS — IMPROVEMENTS — CONTRACT—CALL FOR BIDS—FILING AND CHANGING SPECIFICATIONS. Under a city charter requiring contracts to be let to the lowest bidder upon notice, at the time of publication of which notice plans and specifications must be filed and open to public inspection, the city makes such a material modification of the specifications filed as to invalidate subsequent proceedings, when, after filing the same and publishing notice, it sends out a circular letter to bidders to the effect that the specifications filed, particularly describing the materials and details of the construction of an electrical fire alarm apparatus, were intended only to define a standard of functions to be performed by the apparatus and equipment, and not to define or limit its type, design or construction, and that apparatus of any type, design or construction that would properly perform the functions indicated by the specifications, if satisfactory to the board and city electrician, will be acceptable to the city. *Goshert v. Seattle* ..... 645

3. SAME—ENJOINING MUNICIPAL CONTRACT—PARTIES PLAINTIFF—TAXPAYERS. Residents and taxpayers in a city may maintain an action to enjoin the letting of a contract required to be let to the lowest bidder, in violation of a charter provision requiring plans and specifications to be filed, and it is immaterial that the suit was commenced at the instance and cost of an unsuccessful bidder. *Goshert v. Seattle* ..... 645

4. MUNICIPAL CORPORATIONS—CONTRACTS—ULTRA VIRES—ESTOPPEL TO PLEAD. Neither the sureties nor a city contractor, who was paid for defective work upon his giving bonds to repair and complete the work, can interpose the plea of *ultra vires* to escape liability on the bonds, where the giving was not prohibited by law. *Spokane v. Costello* ..... 183

5. MUNICIPAL CORPORATIONS—OFFICERS — DISQUALIFICATIONS. Under a charter disqualifying any person appointed to the office of civil service commissioner from holding any other office during the term for which he was appointed, a person appointed to the office at a time when he was disqualified to act as commissioner, who accepted the office and continued to hold it after his disqualification was removed, cannot claim that he was not "appointed" to the office or a *de jure* officer; as the appointment is a continuing one, and he is disqualified from holding any other office during the term for which he was appointed. *State ex rel. Chealander v. Carroll*... 202

6. MUNICIPAL CORPORATIONS—AUTHORITY OF OFFICERS—JUDGMENT—VALIDITY. A judgment in condemnation proceedings by a city, upon

MUNICIPAL CORPORATIONS—CONTINUED.

the stipulation of city officers entitled to represent the city, is not void for want of authority of the officers to make the stipulation, where the court had jurisdiction of the subject-matter and the parties, and cannot be repudiated by the adverse party for the city. *James v. Seattle*..... 318

7. MUNICIPAL CORPORATIONS — STREETS — PRESCRIPTIVE RIGHTS—NATURE. The prescriptive right to a public street by adverse possession does not involve any property rights of the city in which the street is located. *State v. Seattle*..... 602

8. MUNICIPAL CORPORATIONS — STREETS — RIGHT TO MAKE IMPROVEMENTS—WAIVER OF OBJECTION—DAMAGE FROM CHANGE OF GRADE. The objection that a city can only grade streets under the terms of an ordinance, cannot be raised in an action for damages to abutting property, when the owner might have enjoined the improvement complained of but failed to do so. *Ettor v. Tacoma*..... 50

9. MUNICIPAL CORPORATIONS—STREETS—RIGHTS OF ABUTTERS—CONSTITUTIONAL LAW—PROPERTY. Owners of lots abutting on a street have a special interest in the use of the street which is distinct from that of the public generally and which constitutes property. *State v. Seattle*..... 602

10. MUNICIPAL CORPORATIONS—STREETS — OBSTRUCTIONS — SPECIAL INJURY—ABUTTING OWNERS—INSTRUCTIONS. An abutting property owner upon an alley, which he uses for access to his property, suffers a special damage by its obstruction which differs in kind from that suffered by the general public; and it is error to instruct the jury that he cannot recover if his damages were of the same character and kind as those sustained by owners of other property on the alley, and the general public. *Sweeney v. Seattle*..... 678

11. SAME. Such an instruction is not cured by recalling the jury and expressly refusing to change it, but adding that what was meant was that plaintiff could not recover if he suffered only the damages of inconvenience suffered by the general public. *Sweeney v. Seattle* 678

12. MUNICIPAL CORPORATIONS—STREET ASSESSMENTS—STIPULATION OF OWNERS—ESTOPPEL. A property owner, petitioning for the improvement of streets on certain conditions being performed, is not found by his stipulation agreeing to a certain assessment upon his lots, or estopped from questioning the validity of the assessment, where it appears that the city did not perform the stipulated conditions but levied the assessments in entire disregard of the stipulation. *Lewis & Wiley v. Cook*..... 1

13. MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—PERSONAL LIABILITY. The owner is not personally liable for local improvement assessments upon his real property. *Clizer v. Krauss*..... 26

MUNICIPAL CORPORATIONS—CONTINUED.

14. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENTS—APPEAL—REVIEW. The limits of a special assessment district fixed by the commission, and the amount taxed against the general fund, will not be disturbed on appeal, where the limits do not appear to be unreasonable and the entire cost might have been assessed against the property. *In re Pine Street, Seattle*..... 178

15. SAME—FINDINGS—REVIEW. A special assessment will not be disturbed as unequal or unjust, where it rests upon opinion and the evidence is conflicting. *In re Pine Street, Seattle*..... 178

16. SAME—ASSESSMENT — INTEREST ON CONFIRMATION — AWARD. Interest upon an award on condemnation of property needed for a street improvement may be included as part of the cost of the improvement to be assessed against the property benefited. *In re Pine Street, Seattle*..... 178

17. SAME — AWARD — VERDICT — EFFECT — ASSESSMENT FOR BENEFITS. Upon condemnation of property needed for a street improvement, a verdict for the value of land taken, reciting that the remainder of the lot is not damaged by reason of the taking, precludes the claim that an award of damages was made therefor. *In re Pine Street, Seattle* ..... 178

18. SAME—ASSESSMENTS—EXEMPTIONS—LANDS NOT TAKEN—EMINENT DOMAIN—VERDICT. Where the verdict for the value of land taken for a street improvement recites that the remainder was not damaged by the taking, the same is not exempt from assessment for special benefits as it would have been if found to be damaged by the taking. *In re Pine Street, Seattle*..... 178

19. MUNICIPAL CORPORATIONS — IMPROVEMENTS—PROCEEDINGS—ASSESSMENTS—EMINENT DOMAIN. Where it is necessary to exercise the power of eminent domain in order to make a municipal improvement, the entire proceedings need not be completed under the eminent domain act, Rem. & Bal. Code, § 7768, which was designed solely to ascertain and assess the compensation; and the city may order the work done and levy the assessment under its charter provisions and ordinances, and not in the condemnation proceedings. *Brown v. Seattle*..... 314

20. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—CONFIRMATION—FINDINGS—NECESSITY. The hearing in the superior court upon the confirmation of a city assessment roll for public improvements, is not the trial of an action at law in which findings of fact are required. *Brown v. Seattle*..... 314

21. SAME—REVIEW. The confirmation of a local municipal assessment will not be set aside upon appeal upon conflicting testimony evenly balanced, especially where there is nothing to indicate un-

MUNICIPAL CORPORATIONS—CONTINUED.

fairness or partiality, and the city council spent much time in equalizing the assessments. *Brown v. Seattle*..... 314

22. MUNICIPAL CORPORATIONS — SIDEWALKS — CONSTRUCTIVE NOTICE—EVIDENCE—ADMISSIBILITY. In an action for injuries sustained in a fall upon a defective sidewalk, evidence of the condition of the walk and of other accidents but a few days, or at most weeks, prior to the accident in the same locality, is admissible to show constructive notice of the defect. *Falldin v. Seattle*..... 307

23. MUNICIPAL CORPORATIONS—CLAIMS FOR INJURIES—VARIANCE—ULTIMATE EFFECTS. A claim against a city for personal injuries to plaintiff's "limbs, side, back, and neck," admits of evidence of a goiter that developed subsequently and by reason of the accident, where the ultimate result could not be known at the time of the accident, and the defendant had ample opportunity to investigate and claimed no surprise. *Falldin v. Seattle*..... 307

24. MUNICIPAL CORPORATIONS — ACTIONS — CLAIMS FOR INJURIES — PLEADING. A complaint in an action against a city for personal injuries fails to state that the claim required by charter provisions was filed with the city council, as against a demurrer, where it merely alleges that the plaintiff caused the city and its officers and agents to be fully informed of the time, place, cause, etc., of the injury. *Giuricevic v. Tacoma*..... 329

25. SAME—NOTICE OF CLAIM—DEFECTS IN STREET—FALL OF POLE. A charter provision requiring claims to be filed with the city council for injuries to the person caused by defects, want of repair, or obstructions in streets, does not apply to a claim against a city for negligently allowing an electric light pole to fall upon a servant of the city grading a street, as the provisions must be strictly construed, and not extended beyond its terms. *Giuricevic v. Tacoma*..... 329

26. SAME—NOTICE OF CLAIM—INJURIES TO SERVANT OF CITY—SAFE PLACE TO WORK. A charter provision requiring notice of claims to be filed with the city council for injuries to the person caused by defects, want of repair, or obstructions in streets, has no application to injuries to a servant of the city, injured by reason of the city's failure to furnish a safe place to work; as the city is presumed to have notice of injury to its servants, and the purpose of the provision is to give notice of spurious claims. *Giuricevic v. Tacoma*..... 329

27. MUNICIPAL CORPORATIONS—JUDGMENTS—FUNDS FOR PERSONAL INJURY CLAIMS. A judgment against a city for personal injuries was not, under former laws, satisfied by issuing and tendering warrants upon the city's indebtedness fund, since the city current expense fund was the only fund on which the warrant could be drawn. *State ex rel. Billings v. Lamprey*..... 84

MUNICIPAL CORPORATIONS—CONTINUED.

28. SAME. Rem. & Bal. Code, §§ 7999-8001, authorizing cities to create an accident fund, and directing payment of personal injury judgments therefrom, affects only the remedy, and is applicable to existing judgments for which no warrants were drawn when the law went into effect. *State ex rel. Billings v. Lamprey*..... 84

NAMES:

See TRADE-MARKS AND TRADE-NAMES.

NAVIGABLE WATERS:

Disposal of state tide lands, see PUBLIC LANDS, 3-6.

NEGLIGENCE:

See ELECTRICITY.
Of carriers in carriage of livestock, see CARRIERS.
Of employers, see MASTER AND SERVANT.
Risks assumed by servant, see MASTER AND SERVANT, 15-19.
Contributory negligence of servant, see MASTER AND SERVANT, 20-25.
Injuries from defects or obstruction in streets, see MUNICIPAL CORPORATIONS, 22-26.
Liability of surgeon for negligence, see PHYSICIANS AND SURGEONS, 1.
Injuries to person on or near railroad tracks, see RAILROADS, 2.
In actions against street railroads, see STREET RAILROADS.

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE:

See NEW TRIAL, 6-8.

NEW TRIAL:

Right to review order rendered on motion for new trial, see APPEAL AND ERROR, 3.
Effect of motion for new trial on time to appeal, see APPEAL AND ERROR, 18.
Hearing motion outside county, see JUDGES.

1. NEW TRIAL—MOTION—TIME FOR. Where plaintiff is satisfied with a verdict, but the court enters judgment inconsistent therewith, he is then for the first time called upon to move for a new trial. *O'Brien v. American Casualty Co*..... 598

2. SAME—EXTENSION OF TIME. The time for making a motion for a new trial may be extended by the court. *O'Brien v. American Casualty Co.* ..... 598

3. NEW TRIAL—RIGHT TO MOVE FOR. The fact that a party could have appealed from a judgment *non obstante veredicto* does not deprive him of his right to move for a new trial. *O'Brien v. American Casualty Co*..... 598

NEW TRIAL—CONTINUED.

4. NEW TRIAL—SECOND MOTIONS—ORDER—FINALITY. After the denial of a motion for a new trial, required to be made within a specified time, the trial court is without jurisdiction to consider another motion for a new trial. *Kincaid v. Walla Walla Valley Traction Co.* 334

5. NEW TRIAL—EVIDENCE—SUFFICIENCY. The fact that the trial judge's opinion as to the facts established differs from the opinion of the jury, as expressed by the verdict, does not require him to grant a new trial. *Kincaid v. Walla Walla Valley Traction Co.* 334

6. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. A new trial for newly discovered evidence is properly denied where the evidence either fails to meet the issue or is cumulative. *Kincaid v. Walla Walla Valley Traction Co*..... 334

7. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial for newly discovered evidence is properly denied where its materiality must have been known at the trial and the slightest diligence would have procured it. *Mortimer v. Dirks*..... 402

8. NEW TRIAL—DILIGENCE. In an action for injuries sustained by a traveler, who alleged that his wagon wheels came in contact with unguarded street car tracks where the company should have planked the street, lack of diligence will prevent the granting of a new trial for the newly discovered evidence of a witness who would testify that the wagon tracks indicated that the wheels did not come in contact with the rails, where it appears that the company's manager visited the scene of the accident soon after the accident and before removal of the wagon, and did not investigate to ascertain whether the wheels had come in contact with the rails. *Kincaid v. Walla Walla Valley Traction Co*..... 334

9. NEW TRIAL—ABSENCE OF WITNESS—DILIGENCE. It is not error to refuse a new trial on account of the absence of a witness where no continuance was asked, and the same facts could have been shown by other witnesses. *Mortimer v. Dirks*..... 402

**NOMINATIONS:**

For office, see ELECTIONS.

**NONSUIT:**

Harmless error in, see APPEAL AND ERROR, 34.
Before trial, see DISMISSAL AND NONSUIT.

**NOTES:**

Promissory notes, see BILLS AND NOTES.

**NOTICE:**

Of appeal, see APPEAL AND ERROR, 12, 13.
Judicial notice, see EVIDENCE, 1.

NOTICE—CONTINUED.

Proceedings for distribution, see EXECUTORS AND ADMINISTRATORS, 3, 4.

To tenant to terminate tenancy from month to month, see LANDLORD AND TENANT, 5, 7-9.

Claim for injury from defects or obstructions in street, see MUNICIPAL CORPORATIONS, 23-26.

Of defective sidewalk, see MUNICIPAL CORPORATIONS, 22.

Trial in civil action in general, see TRIAL, 1.

Affecting *bona fides* of purchaser of land, see VENDOR AND PURCHASER, 1-4.

OBJECTIONS:

Review as dependent on objection or exception made on trial, see APPEAL AND ERROR, 5-11.

OCCUPANCY:

Of land as prerequisite to homestead, see HOMESTEAD.

OFFICERS:

Judges, see JUDGES.

Municipal officers, see MUNICIPAL CORPORATIONS, 5, 6.

Acts by deputy, see TAXATION, 7.

1. OFFICERS—DISQUALIFICATIONS—OFFICIAL BONDS—FAILING TO GIVE—EFFECT. The failure of an officer to give a bond, which was a ministerial act for the security of the government and not a condition precedent to his authority to act, does not render him merely a *de facto* officer, but he is a *de jure* officer under a defeasible title, and subject to the disqualification of holding other offices attached to the office. *State ex rel. Chealander v. Carroll*..... 202

OPINIONS:

As to value of lands, see EVIDENCE, 5.

As ground for challenge of juror, see JURY.

Of attorney as to law of another state, see TRIAL, 5.

OPTION:

To declare debt due, see MORTGAGES, 2, 3.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

Specific performance, see SPECIFIC PERFORMANCE, 1.

As to court proceedings, see STIPULATIONS.

ORAL NOTICE:

Of appeal, see APPEAL AND ERROR, 13.

ORAL TRUSTS:

See TRUSTS.

**ORDER OF PROOF:**

In civil actions, see TRIAL, 3.

**ORDERS:**

Review of appealable orders, see APPEAL AND ERROR, 1-3.

**ORDINANCES:**

Municipal ordinances, see MUNICIPAL CORPORATIONS, 1.

**OYSTER LANDS:**

Disposal of, see PUBLIC LANDS, 3-6.

**PAROL AGREEMENTS:**

Effect and requirements of statute of frauds, see FRAUDS, STATUTE OF.

**PAROL PARTITION:**

See PARTITION.

**PAROL TRUST:**

Validity of, see TRUSTS.

**PARTIES:**

Persons entitled to appeal, see APPEAL AND ERROR, 4.
Entitled to alleged error, see APPEAL AND ERROR, 22.
To action for injunction, see CEMETERIES, 2.
Condemnation proceedings, see EMINENT DOMAIN, 19.
Administrator of principal on bond, see EXECUTORS AND ADMINISTRATORS, 7.
Persons concluded by judgment, see JUDGMENT, 5.
In condemnation proceedings, see LOGS AND LOGGING, 3.
On foreclosure of mechanic's lien, see MECHANICS' LIENS, 3.
To action to restrain illegal municipal debt, see MUNICIPAL CORPORATIONS, 3.
Cotenants, see TENANCY IN COMMON.

1. PARTIES—BONDS. Under Rem. & Bal. Code, § 192, a contractor and the surety on his bond may be joined as parties defendant in an action on the bond. *Spokane v. Costello*..... 183

2. PARTIES—DEFENDANTS—TRUSTEES—GUARDIANS—MECHANICS' LIENS. Under Rem. & Bal. Code, § 180, authorizing the trustee of an express trust to sue without joining the *cestui que* trust, the guardian of infants, to whom a deed was made as trustee without limitations, may be sued as the holder of the legal title, without joining the infants, in an action to foreclose a mechanics' lien. *Mers v. Mehner* ..... 324

3. PARTIES—SURETIES ON BOND — ACTIONS — JUDGMENTS — CONSTITUTIONAL LAW—DUE PROCESS—LIENS—FORECLOSURE. Where, in an action to foreclose a materialman's lien upon a vessel in the hands of a receiver, the vessel is released from custody upon defendant's

PARTIES—CONTINUED.

substituting a bond wherein the sureties agree that their personal liability thereon shall become substituted for any security or claim which the plaintiff may have against the vessel, and that they are substituted for and take the place of the vessel, the sureties become parties to the action to the extent that, upon default of the defendant, personal judgment may be rendered against them in the original cause, without violating their constitutional right to due process of law, or any principal of law. *Kalb-Gilbert Lumber Co. v. Cram*. 550

PARTITION:

Action for, see LIMITATION OF ACTIONS, 2.

1. PARTITION — BY PAROL — EVIDENCE—SUFFICIENCY. Evidence that two heirs contemplated dividing property left by their mother is insufficient to show a parol partition between them. *Horton v. Barto* ..... 477

PART OWNERS:

In general, see TENANCY IN COMMON.

PART PERFORMANCE:

To satisfy statute of frauds, see FRAUDS, STATUTE OF, 2.

PAYMENT:

See COMPROMISE AND SETTLEMENT; TENDER.
Effect of payment of judgment to client on lien of attorney for fees, see ATTORNEY AND CLIENT.
On severable contract, see CONTRACTS, 2.
By mail, see MORTGAGES, 4.
Subrogation on payment, see SUBROGATION.
Price of land sold, see VENDOR AND PURCHASER, 10, 11.
"Prompt" payment, see VENDOR AND PURCHASER, 20.

PENALTIES:

Under contracts, see DAMAGES, 2, 3.
Penal ordinances, see MUNICIPAL CORPORATIONS, 1.

PENDENCY OF ACTIONS:

As ground for abatement, see ABATEMENT AND REVIVAL.

PENSIONS:

1. PENSIONS—PARTIES ENTITLED—DEATH OF APPLICANT PENDING APPLICATION. Rem. & Bal. Code, § 8923, granting pay for services performed by the Indian war veterans is a gift in the nature of a pension, limited by its terms to the veteran in *propria persona*, and in case of his death pending his application, payment cannot be made to his heir or personal representative; since no provision is made therefor. *Whitaker v. Clausen* ..... 268

**PERSONAL INDIGNITIES:**

As ground for divorce, see DIVORCE, 1-4.

**PERSONAL INJURIES:**

Inadequate and excessive damages, see DAMAGES, 4-7.
Caused by electricity, see ELECTRICITY.
To employee, see MASTER AND SERVANT.
From defects or obstructions in street or public place, see MUNICIPAL CORPORATIONS, 22-26.
To person on or near railroad tracks, see RAILROADS, 2.
Release of claim for damages, see RELEASE.

**PERSONAL JUDGMENT:**

On foreclosure of mechanic's lien, see MECHANICS' LIENS, 5.

**PHYSICIANS AND SURGEONS:**

Liability of master for negligence of physician in treating injured servant, see MASTER AND SERVANT, 1.

1. PHYSICIANS AND SURGEONS—NEGLIGENCE—REASONABLE CARE—USE OF X-RAY. The evidence fails to show negligence of a physician in diagnosing a broken wrist as a sprain, where the fracture could only have been discovered by an X-ray photograph, which is used only as a matter of extreme care, and many physicians practice without any X-ray machine. *Wells v. Ferry-Baker Lumber Co*..... 658

2. PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—INFORMATION—SUFFICIENCY. An information charging the practicing of medicine without a license in the language of the statute, is sufficient without setting forth requirements for obtaining the license which are not made a part of the substantive crime, and without pleading matters made by the statute *prima facie* evidence of the fact that the accused had no license. *State v. Dechmann*. 690

3. SAME—LICENSE—FILING—RESIDENCE OF DEFENDANT—FAILURE OF PROOF. In a prosecution for practicing medicine without a state license filed of record in the county of defendant's residence, there is a failure of proof where the state fails to show the residence of the defendant, although it was shown that he practiced medicine in the county charged without any license filed in such county. *State v. Dechmann*..... 690

**PLATS:**

Including tide lands, see DEDICATION, 1.
Reference to, in deeds, see DEEDS, 3.
By boom company seeking condemnation, see LOGS AND LOGGING, 3-5.

**PLEADING:**

Joinder of causes of action, see ACTION.
Demurrer, waiver, see APPEAL AND ERROR, 6.

PLEADING—CONTINUED.

For breach of contract, see CONTRACTS.
Pleas in criminal prosecution, see CRIMINAL LAW, 1, 2.
Defects as ground for dismissal, see DISMISSAL AND NONSUIT.
In action for divorce, see DIVORCE, 5.
Condemnation proceedings, see EMINENT DOMAIN, 4, 9, 10.
Estoppel in pais, see ESTOPPEL, 1.
Estoppel by allegation in pleadings, see ESTOPPEL, 2.
In action by servant for personal injuries, see MASTER AND SERVANT, 7.
As determining right to reference, see REFERENCE, 3.
In suit for specific performance, see SPECIFIC PERFORMANCE.
In action for seduction, see TORTS.
For infringement of trade-mark, see TRADE-MARKS AND TRADE-NAMES.
Amendments to conform to proof, see TRIAL, 2.

1. PLEADING—COMPLAINT—AMENDMENT—WAIVER OF OBJECTION. An answer on the merits without objection waives an objection at the trial that an amended complaint is a departure and states a different cause of action from the original complaint. *Curtis v. Parks* ..... 223

2. PLEADING—SUPPLEMENTAL COMPLAINT—PREMATURE ACTION. Where an action is prematurely commenced, it cannot be made the basis for a supplemental complaint upon the maturing of the debt. *Gunby v. Ingram*..... 97

3. PLEADING—VARIANCE—WAIVER—CARRIERS. It is not a fatal variance that the pleading alleged an implied contract to carry and deliver live stock as at common law, and the proof showed a special contract by bill of lading, where the proof was admitted without objection. *Bartelt v. Oregon R. & Nav. Co*..... 16

PLUMBERS:

Lien for work, see MECHANICS' LIENS, 1.

POSSESSION:

See ADVERSE POSSESSION.
To support suit to quiet title, see QUIETING TITLE, 1.
Of land as notice affecting bona fides of purchase, see VENDOR AND PURCHASER, 3.

PRACTICE:

See ABATEMENT AND REVIVAL; APPEAL AND ERROR; CRIMINAL LAW; DISMISSAL AND NONSUIT; DIVORCE; JUDGMENT; MANDAMUS; NEW TRIAL; PARTIES; PLEADING; REFERENCE; STIPULATIONS; TENDER; TRIAL.
Condemnation proceedings, see EMINENT DOMAIN.

**PREJUDICE:**

Ground for reversal in civil actions, see APPEAL AND ERROR, 23-34.
As ground for challenge of juror, see JURY.

**PRESCRIPTION:**

Establishment of highways, see HIGHWAYS.
Rights in city street, see MUNICIPAL CORPORATIONS, 7.

**PRESUMPTIONS:**

On apportionment of taxes, see TAXATION, 5.

**PRINCIPAL AND AGENT:**

See BROKERS.
Representation of corporation by agent, see CORPORATIONS, 1.
Agency of husband for wife, see HUSBAND AND WIFE, 3.

1. PRINCIPAL AND AGENT—RELATION—EVIDENCE—SUFFICIENCY—MASTER AND SERVANT—INDEPENDENT LESSEE. Evidence that a foreign corporation, the owner of a vessel, directed its operation, took the freights earned and paid the expenses of operation, makes a question for the jury upon an issue as to whether a local corporation in charge was an independent lessee, because so styled in a lease, or merely the agent of the owner and the lease a mere makeshift to avoid liability for personal injuries. *Anderson v. Globe Navigation Co.* ..... 502

2. PRINCIPAL AND AGENT—AUTHORITY—EMPLOYMENT OF ATTORNEYS—EVIDENCE—SUFFICIENCY. A person prosecuted for maintaining a place in which intoxicating liquors were kept for unlawful sale and for selling the same without a license, was a general distributing agent of a foreign corporation which owned the goods, and was acting within the scope of his general authority in employing an attorney to defend him and to resist seizure and sale of the goods, valued at several thousand dollars, where it appears that the agent so represented to the attorneys and showed them correspondence between himself and the company bearing out his statements, that the right to sell the goods had been similarly litigated in other states, that the agent kept the company fully advised as to the prosecutions, wrote for instructions, and made a payment on the account by draft on the company, which acquiesced in and ratified the employment. *Keenan v. Lauritzen Malt Co.* ..... 367

**PRINCIPAL AND SURETY:**

See INDEMNITY.
As parties defendant, see PARTIES, 1, 3.

**PRIORITIES:**

Of mortgages, see CHATTEL MORTGAGES, 3.

**PROBATE:**

Failure to record, see RECORDS, 1.
Of wills, see WILLS.

**PROCESS:**

On appeal, see APPEAL AND ERROR, 12-13.
To sustain judgment, see JUDGMENT, 2, 5.

**PROMISE:**

Of master to repair defects in appliances, see MASTER AND SERVANT, 7-9, 17.

**PROMISSORY NOTES:**

See BILLS AND NOTES.

**PROPERTY:**

See MINES AND MINERALS; TRADE-MARKS AND TRADE-NAMES.
Adverse possession, see ADVERSE POSSESSION.
Taking for public use, see EMINENT DOMAIN.
Effect of severing timber from land, see LOGS AND LOGGING, 1, 2.

**PROXIMATE CAUSE:**

Of injury to servant, see MASTER AND SERVANT, 10.

**PUBLIC DEBT:**

See COUNTIES.

**PUBLIC IMPROVEMENTS:**

By cities, see MUNICIPAL CORPORATIONS, 8-21.

**PUBLIC LANDS:**

See DEDICATION, 1.
Acquisition by adverse possession, see ADVERSE POSSESSION, 2.
Interests in as separate or community property, see HUSBAND AND WIFE, 5.
Mineral lands, see MINES AND MINERALS.

1. PUBLIC LANDS—RAILROAD GRANTS—RELINQUISHMENT—SETTLEMENT. Under act Cong. July 1, 1898, 30 Stats. 620, providing that when certain railroad lands shall be settled on in good faith prior to survey, and proof thereof made, with due relinquishment by the railroad company, the company may then select other lands in lieu thereof, it is optional on the part of the company to relinquish its rights to lands settled on subsequently to the passage of the act. *Cameron v. Lyen*..... 384

2. PUBLIC LANDS—DECISIONS OF DEPARTMENT—RULE OF DECISIONS. Where the equities of the settler depend upon an act of Congress, rules of the department in accord with the court's construction of the act are to be given due weight. *Cameron v. Lyen*..... 384

PUBLIC LANDS—CONTINUED.

3. PUBLIC LANDS—TIDE LANDS—DEFINITION—BOUNDARIES. Tide lands, proper, are those lying between the lines of ordinary high tide and mean low tide, the law accepting the mean and not the extreme where boundaries are concerned. *Pearl Oyster Co. v. Heuston*. 533

4. SAME—STATUTES—CONSTRUCTION. There is no conflict between Rem. & Bal. Code, § 6641, defining tide lands and § 6744 dividing all tide lands into two classes with reference to the location of the boundaries of cities and towns. *Pearl Oyster Co. v. Heuston*.... 533

5. PUBLIC LANDS—TIDE LANDS—STATE DEED—CONSTRUCTION. A state deed of all tide lands situate in front of, adjacent to, or abutting, upon, certain portions of the government meander line particularly described, extends only to the line of mean low tide, under Rem. & Bal. Code, § 6641, defining tide lands as those over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide; especially as a grant by a state is to be construed most strongly against the grantee, and restricted to the narrowest limits that will reasonably satisfy the grant if no limit is fixed by the deed. *Pearl Oyster Co. v. Heuston*..... 533

6. PUBLIC LANDS—OYSTER LANDS—SALE—APPLICATION—INTEREST OF OBJECTORS. The grantee of tide lands extending only to mean low tide has no interest entitling him to object to a state sale of oyster lands lying below the line of mean low tide; since only the state can question the right of another to purchase such lands. *Pearl Oyster Co. v. Heuston*..... 533

7. PUBLIC LANDS—UNIVERSITY LANDS—POWER TO DISPOSE OF—REGENTS. The acts of the territorial legislature authorizing the board of regents of the state university to sell the old university site at public auction under specified restrictions did not empower the board by resolution to give the use of a strip along an alley to the abutting owners nor to dedicate the strip for a public street. *State v. Seattle* ..... 602

PUBLIC POLICY:

Validity of contract of carrier limiting liability for loss of cattle shipped, see CARRIERS, 2.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN, 3-8.

QUANTUM MERUIT:

See CONTRACTS, 4.
Recovery for, when not allowable, see ABATEMENT AND REVIVAL.

QUASHING:

Execution, see EXECUTION.

**QUESTION FOR JURY:**

In action for injuries to servant, see MASTER AND SERVANT, 4, 20, 22, 26.

**QUIETING TITLE:**

1. QUIETING TITLE—EQUITABLE TITLE OF PLAINTIFF—TAXATION—DEED—ACTION TO SET ASIDE—POSSESSION. Equitable title to property under a quitclaim deed with a faulty description (which might be reformed), is sufficient to authorize an action to quiet title and set aside a void tax title, nor is it necessary that the plaintiff be in possession. *Brodsky v. Nelson*..... 671

2. SAME—PROOF OF EQUITABLE TITLE—SUBSEQUENT DEED—ADMISSIBILITY. Where the plaintiff in an action to quiet title and set aside a void tax title held a superior equitable title, before suit brought, under a deed with a faulty description that might be reformed, a quitclaim deed correcting the error, received by the plaintiff after commencement of the action, is admissible to supply proof of the error in the original deed upon which an action of reformation could have been based. *Brodsky v. Nelson*..... 671

3. QUIETING TITLE—RELIEF GRANTED—PERSONAL JUDGMENT—PLEADING. It is not error to refuse to enter a personal judgment against a defendant where the prayer of all the pleadings was for a decree quieting title to real property. *Curry v. Wilson*..... 509

**QUITCLAIM:**

Grantee in quitclaim deed as bona fide purchaser, see VENDOR AND PURCHASER, 1, 2.

**RAILROAD COMMISSION:**

Order fixing charges, appeal, see CARRIERS, 6.

**RAILROADS:**

Injuries to cattle in cars, see CARRIERS.
Control and regulation of carriers, see CARRIERS, 6.
Grant of right of way through public lands, see PUBLIC LANDS, 1.
Railroads in city streets, see STREET RAILROADS.

1. RAILROADS—FENCES—CROSSINGS—STATUTES—IMPLIED REPEAL. The railroad fence act of 1893, Rem. & Bal. Code, § 8729, requiring railroads, where the same person owns land on both sides of the track, to put in and maintain necessary crossings and gates, was impliedly repealed by the acts of 1903 and 1907, covering the same subject, Rem. & Bal. Code, § 8730, which provided that the owner shall have the right to put in gates for his use at such places as may be convenient. *Huffman v. Oregon R. & Nav. Co*..... 494

2. RAILROADS—OBSTRUCTIONS NEAR TRACK—NEGLIGENCE—EVIDENCE—SUFFICIENCY. It is actionable negligence to knowingly leave a skid,

RAILROADS—CONTINUED.

used for loading a donkey engine, so near the tracks of a logging railway that it was liable to be struck by a train of logs passing while men were working at the place and liable to be struck by the skid. *Harris v. Brown's Bay Logging Co*..... 8

RAPE:

1. RAPE—EVIDENCE—SUFFICIENCY. The evidence is sufficient to sustain a conviction of rape committed between the 19th and 26th days of a certain month, where it appears that the prosecuting witness was under the age of consent; that between said dates she and the defendant registered at different hotels as man and wife under assumed names and occupied a single room over night; that the defendant was arrested while occupying a bed with her, and that a physical examination by a physician a few days after showed evidence of recent penetration. *State v. Biggs*..... 514

RATES:

Reasonableness of switching charges, see CARRIERS, 6.

RATIFICATION:

Of act of corporate officer or agent, see CORPORATIONS, 1.
Of unauthorized or illegal contracts of municipal officers, see MUNICIPAL CORPORATIONS, 6.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Conveyance, see VENDOR AND PURCHASER.

REBUTTAL:

Evidence, see TRIAL, 3.

RECEIVERS:

Right of receiver to appeal from decisions made in proceedings, see APPEAL AND ERROR, 4.
Of corporations in general, see CORPORATIONS, 4-6.

1. RECEIVERS—SALES—VACATION—LIMITATIONS—LACHES. A sale made by a receiver to his business associate, confirmed by the court, will not be vacated for fraud and inadequacy of price, where it appears from the petition that the applicants knew of the business relationship of the purchaser and the inadequacy of price at the time of the sale and confirmation, and did not file their petition within one year as required by Rem. & Bal. Code, § 466, but waited several years until sued for unpaid stock subscriptions. *Dibble v. Washington Food Co*..... 176

RECEIVERS—CONTINUED.

2. RECEIVERS—ACTIONS AGAINST—CHATTEL MORTGAGES—ESTABLISHMENT—PROCEEDS OF PROPERTY SOLD. After a receiver's sale of personal property under an order of court in the receivership, it is error to allow a mortgagee to prosecute an action to foreclose a mortgage thereon and allow attorney's fees provided in the mortgage; since the mortgage lien could have been established in the receivership, and after the receiver's sale becomes a lien to be allowed against the proceeds without the penalty for attorney's fees and unnecessary costs of the independent action. *Pickering v. Richardson* ..... 117

RECORDS:

Transcript on appeal or writ of error, see APPEAL AND ERROR, 15.
As notice affecting bona fides of purchase of land, see VENDOR AND PURCHASER, 4.

1. RECORDS—PROBATE—FAILURE TO RECORD WILL. Failure to record a will, under Rem. & Bal. Code, § 1306, requiring a copy of a will to be recorded in the county auditor's office of each county in which lands devised are located, does not relieve a purchaser of taking notice of the interests of devisees where the will was probated in the county in which the land is located. *Horton v. Barto*..... 477

REDEMPTION:

Of tax, mistake in certificate, see TAXATION, 4.

REFERENCE:

1. REFERENCE—ACCOUNT—COMPULSORY REFERENCE—EQUITY—RIGHT TO JURY TRIAL. The rights of the parties cannot be determined except by taking an accounting, and a compulsory reference may be ordered, under Rem. & Bal. Code, § 370, and a jury trial denied, where the first cause of action alleged that defendant had been left in charge of plaintiff's business, a manufacturing plant, upon a salary, with the duty of a manager, including the keeping of accounts, for about one year, that defendant had disobeyed instructions, constructed himself a house from plaintiff's materials, misappropriated money, and overdrawn his account, for which he had made no accounting, setting forth the items in detail, aggregating $1,291.30; and the answer claimed a larger salary based upon the profits of the business alleged at $7,344, claiming a balance due him of over $1,600; and the reply denied that there were any profits in the business. *Lindley v. McGlauflin* ..... 581

2. REFERENCE—ACCOUNT—FIDUCIARY RELATIONS. In an action involving a long and complicated account, a compulsory reference may be ordered regardless of whether any partnership or other fiduciary relation existed between the parties. *Lindley v. McGlauflin*..... 581

3. REFERENCE—PLEADINGS—ACTIONS—LEGAL OR EQUITABLE—DETERMINATION. Whether an action presents a legal or equitable cause of

REFERENCE—CONTINUED.

action, involving a long and complicated account, may be determined from all the pleadings, and does not depend upon the complaint alone. *Lindley v. McGlauflin*..... 581

REGISTRATION:

RECORDS.

REHEARING:

On appeal, see APPEAL AND ERROR, 19.

RELEASE:

Discharge by compromise or settlement, see COMPROMISE AND SETTLEMENT.

1. RELEASE AND DISCHARGE—EXECUTION—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained by a railroad brakeman, the evidence conclusively shows a valid release and settlement, barring the right to recover, where it appears that the plaintiff received $225 and signed a typewritten release and discharge, showing just above the signature a statement that he had read the release and fully understood it; that plaintiff must have been mistaken in his testimony that he received the money only as a donation and signed a blank sheet of paper so folded as to show only four blank lines; that the release signed could not have been so folded; that the nurse and physician, who witnessed the release, corroborated the defendant's claim agent in the statement that the release was read and signed by the plaintiff; and that plaintiff subsequently wrote letters referring to the settlement; no claim being made of fraud or that plaintiff was overreached or advantage taken of his condition. *Erickson v. Great Northern R. Co.*..... 520

RELOCATION:

Of mining claims, see MINES AND MINERALS.

RENT:

See LANDLORD AND TENANT.

REPEAL:

By implication, see RAILROADS, 1.

REPUTATION:

Of witness, see LEWDNESS, 1.

Of plaintiff for chastity, see SEDUCTION, 1.

RESCISSION:

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Compromise and settlement, see COMPROMISE AND SETTLEMENT.

Of contract for sale of land, see VENDOR AND PURCHASER.

**RESERVATION:**

Oral, to create lease, see LANDLORD AND TENANT, 6.

**RES JUDICATA:**

See JUDGMENT, 2-5.
Decision on appeal as law of the case on new trial in lower court, see APPEAL AND ERROR, 35.

**REVENUE:**

See TAXATION.

**REVERSION:**

Of land acquired by condemnation for nonuser, see EMINENT DOMAIN, 2.

**REVIEW:**

See APPEAL AND ERROR.
Of order of Railroad Commission, see CARRIERS, 6.
In criminal prosecution, see CRIMINAL LAW, 4.

**RIGHT OF WAY:**

Easements, see EASEMENT.

**RIPARIAN RIGHTS:**

See LOGS AND LOGGING.

**RISKS:**

Assumed by employee, see MASTER AND SERVANT, 15-19.

**ROADS:**

See HIGHWAYS.
STREET RAILROADS.

**SAFE PLACE TO WORK:**

See MASTER AND SERVANT, 2-5.
For servant to work, see MUNICIPAL CORPORATIONS, 26.

**SALES:**

Executory, priorities, see CHATTEL MORTGAGES, 3.
Of standing timber, see LOGS AND LOGGING, 1, 2.
Of oyster lands, see PUBLIC LANDS, 5, 6.
Receiver's sales, see RECEIVERS.
Commingling of produce, see SET-OFF AND COUNTERCLAIM.
Of real property, see VENDOR AND PURCHASER.

1. SALES—BREACH—REMEDIES OF BUYER. Where a seller repudiates the contract of sale and refuses to perform, the vendee may recover damages resulting from part performance and loss of profits without proceeding to full performance upon his part. *Curtis v. Parks* ..... 223

SALES—CONTINUED.

2. SALES—FACTORS — CONTRACT — EVIDENCE—SUFFICIENCY. The evidence shows a sale, and is insufficient to warrant a finding of a consignment to a broker for sale on commissions, where it appears that the defendant bargained for potatoes from various owners at a specified price, intermingled the different consignments, kept no books as required of commission merchants by statute, and all the consignors testified to absolute sales. *Kempe v. Johnson*..... 154

SATISFACTION:

Of judgment against city, see MUNICIPAL CORPORATIONS, 27 28.

SCHOOL LANDS:

See PUBLIC LANDS, 7.

SECONDARY EVIDENCE:

In civil actions, see EVIDENCE, 2.

SECRETARY OF STATE:

Attested copies of certificate, see TRADE-MARKS, 3.

SEDUCTION:

See TORTS.

Marriage to secure release from arrest on probable cause as affecting annulment on ground of duress, see MARRIAGE, 4.

1. SEDUCTION—DEFENSE—PREVIOUS CHARACTER. Previous chaste character is not a condition precedent to a civil suit for seduction. *Murrilla v. Guis*..... 564

2. SEDUCTION—EVIDENCE—CORROBORATION—NECESSITY. Corroboration of the plaintiff's testimony is not necessary in a civil action for seduction. *Murrilla v. Guis*..... 564

3. SAME—CORROBORATION. There is corroboration of plaintiff's testimony that she was seduced by the defendant, the proprietor of a dance house in which she worked, where it was shown that he paid unusual attention to her and had opportunities, that he purchased drinks for her at different times, was with her in a bed room and had drinks with her there, and that she made complaints at about the time, and there was trouble between them. *Murrilla v. Guis*. 564

SENTENCE:

On appeal from justice court, see CRIMINAL LAW, 3.

SEPARATION:

See HUSBAND AND WIFE, 8, 9.

SET-OFF AND COUNTERCLAIM:

Set-off and counterclaim, see ATTORNEY AND CLIENT, 1.

As ground for objecting to discontinuance, see DISMISSAL AND NONSUIT.

SET-OFF AND COUNTERCLAIM—CONTINUED.

1. SET-OFF AND COUNTERCLAIM—SEVERAL CAUSES ASSIGNED—SALES—INTERMINGLING OF PRODUCE. Where potatoes are sold by various parties and intermingled by the defendant, and all claims for the price were assigned to one person, who sued therefor, the defendant is entitled to a deduction for part returned as unmarketable, although he would have been unable to secure an offset against any individual claim. *Kempe v. Johnson* ..... 154

SETTLEMENT:

See COMPROMISE AND SETTLEMENT; RELEASE;.
Of suit by client, see ATTORNEY AND CLIENT, 1, 4.

SEVERABLE CONTRACT:

See CONTRACTS, 2.
Judgment on, as bar, see JUDGMENTS, 3.

SHERIFFS:

Costs of keeping stock, see CHATTEL MORTGAGES, 4.

SHIPPING:

Ownership of vessel, evidence, see PRINCIPAL AND AGENT, 1.

SPECIFIC PERFORMANCE:

See HUSBAND AND WIFE, 9.

1. SPECIFIC PERFORMANCE—REAL ESTATE—ORAL SALE—FRAUDS, STATUTE OF. Specific performance for the sale of standing timber cannot be decreed upon a written agreement placed in a bank with directions to deliver it to the plaintiff upon payment of the price, within a specified time, and to return it to the defendant after expiration of the time, where the payment was not made and the writing was returned, and the contract for the sale of the timber was oral, and the plaintiff's evidence denied the escrow and had the effect to show that there was no escrow outside of the oral contract of sale. *King v. Upper* ..... 130

2. SPECIFIC PERFORMANCE—DEFENDANT'S OWNERSHIP OF LAND—PLEADINGS. A complaint in an action to enforce the specific performance of a contract to convey land must allege that the defendant was the owner of the property either at the time the contract was made or at the time of the commencement of the action. *Morrisey v. Strom* ..... 487

SPLITTING CAUSES:

See ACTION.

STALE CLAIM:

See TRUSTS, 1.

**STATE AID ROADS:**

Constitutionality, see COUNTIES, 1.
Uniformity of tax for, see TAXATION, 2.

**STATEMENT:**

Of case or facts for purpose of review, see APPEAL AND ERROR, 16-18.

**STATE PROPERTY:**

See PUBLIC LANDS.

**STATES:**

Deed of university land, see ADVERSE POSSESSION, 2.
Legislative power, see CONSTITUTIONAL LAW.
Sovereign power over real property, see HUSBAND AND WIFE, 5.

**STATUTES:**

See FRAUDS, STATUTE OF; MECHANICS' LIENS.
Construction and amendment, see CRIMINAL LAW, 5.
Statutes relating to compensation, see EMINENT DOMAIN.
Partial validity, see EMINENT DOMAIN, 3.
Acquisition and establishment of homestead, see HOMESTEAD.
Statutes of limitation, see LIMITATION OF ACTIONS.
Extraterritorial force, see MARRIAGE, 1.
Law of other state precluding recovery for negligence of fellow servant, see MASTER AND SERVANT, 14.
City ordinances, see MUNICIPAL CORPORATIONS, 1.
Implied repeal, see RAILROADS, 1.

1. STATUTES—VALIDITY—MOTIVE OF LEGISLATURE. The motive of the legislature, or the passing of an act "by stealth," cannot be inquired into by the courts in order to affect the validity of the law. *Ettor v. Tacoma* ..... 50

2. STATUTES—TITLE AND SUBJECTS. The title "An act relating to trade-marks" is sufficient to embrace penal provisions for violations of the act. *State v. Montgomery* ..... 192

3. STATUTES—REPEAL—EFFECT ON PENDING SUIT—MUNICIPAL CORPORATIONS—CHANGE OF GRADE—DAMAGES. Since the right to recover damages resulting from the original grading of city streets rests upon statute (Laws 1893, p. 207, § 47, and Laws 1907, p. 336, § 48) the repeal of the acts without any saving clause, after suit brought, bars a recovery and works a discontinuance of the suit. *Ettor v. Tacoma* ..... 50

**STIPULATIONS:**

As to appealable orders, see APPEAL AND ERROR, 2.
In contracts as to liquidated damages or penalties, see DAMAGES, 2, 3.
As estoppel, see ESTOPPEL, 4.
Of husband, binding on wife, see HUSBAND AND WIFE, 10.
For maturity of mortgage debt on default, see MORTGAGES.

STIPULATIONS—CONTINUED.

For judgment, see MUNICIPAL CORPORATIONS, 6.

Estopping owners from objecting to assessment, see MUNICIPAL CORPORATIONS, 12.

1. STIPULATIONS—ORAL—VALIDITY. An oral "street" agreement of an attorney to file a supersedeas bond on appeal in a cause, whereby the adverse party was led to delay the issuance of execution until the time therefor had expired, is void, under Rem. & Bal. Code, § 130, providing that the court shall disregard all agreements or stipulations in relation to the conduct of any of the proceedings of a cause unless the same be made in open court in the presence of the clerk, entered, etc., or signed by the party or his attorney, *Eisenberg v. Nichols*..... 560

STOCK:

Corporate stock, see CORPORATIONS, 1-3.

STREET RAILROADS:

1. STREET RAILWAYS—STREETS—DEFECTIVE TRACKS—FRANCHISE—LIABILITY. A street railway company, under its franchise requiring it to plank the street between the rails, as well as under the common law, is liable to a traveler who, in driving across the tracks, sustains injury through the company's maintaining its rails without planking, in violation of the franchise, and negligently extending six inches above the ties unprotected except by soft yielding dirt, which gave it the appearance of safety; and it is immaterial that the street was planked at street intersections, as the traveler's right to cross the tracks is not limited to crossings. *Kincaid v. Walla Walla Valley Traction Co*..... 334

2. STREET RAILWAYS—DEFECTIVE TRACKS—CAUSE OF ACCIDENT—EVIDENCE—SUFFICIENCY. There is sufficient evidence to sustain a verdict depending upon the fact that the left rear wheel of a water wagon came in contact with an unprotected street car rail near a street crossing, where the driver of the wagon testified that in making a turn at the crossing both left wheels of his wagon crossed the track, that the front wheel crossed back before leaving the planking at the crossing, and the rear wheel caught on the rail and slid, and the right wheel broke, although the trial judge and the appellate court doubted whether the accident could have occurred in that way; since the record fails to show physical facts that would control the verdict. *Kincaid v. Walla Walla Traction Co*..... 334

STREETS:

See MUNICIPAL CORPORATIONS, 7-10, 22.

Prescriptive right to, see MUNICIPAL CORPORATIONS, 7.

Right to damages for change of grade, see STATUTES, 3.

Grant of rights in street and roads to street railways, see STREET RAILROADS, 1.

**SUBROGATION:**

1. SUBROGATION—INVALID MORTGAGE—WHAT LIENS INCLUDED. There can be no subrogation in favor of a mortgagee, as against the interests of an insane wife, by reason of equities existing at the time the husband executed the mortgage, where at the time the wife was adjudged insane there was no demand against her and no equitable lien on the property subsequently mortgaged. *Curry v. Wilson*. 509

**SUMMARY PROCEEDINGS:**

For recovery of possession by landlord, see LANDLORD AND TENANT, 8-11.

**SUMMONS:**

Proof of service, see JUDGMENTS, 2.

**SUPERSEDEAS:**

On appeal or writ of error, see APPEAL AND ERROR, 14.

**SUPPLEMENTAL PLEADING:**

See PLEADING, 8.

**SURGEONS:**

See PHYSICIANS AND SURGEONS.

**SURPRISE:**

See NEW TRIAL, 8.

**SWITCHING CHARGES:**

Reasonableness of rates, see CARRIERS, 6.

**TAXATION:**

Assessments for municipal improvements, see MUNICIPAL CORPORATIONS, 12-21.

Action to set aside void tax title, see QUIETING TITLE, 1, 2.

1. TAXATION—REAL PROPERTY—COLLECTION—PERSONAL LIABILITY. In this state, the owner is not personally liable for taxes assessed against his real property; the statutory method of enforcing the same as a lien being exclusive. *Clizer v. Krauss*..... 26

2. TAXATION—UNIFORMITY—DIVERSION OF TAX—HIGHWAYS. The constitutional provisions requiring uniformity in taxation and the proper application of taxes are not violated by the state aid road law (Rem. & Bal. Code, § 5880) authorizing the highway commissioner to build state aid roads, 50 per cent of the cost to be paid from the state highway fund, 35 per cent from the county road and bridge fund, and 15 per cent from the local district road fund; since the cost is paid by the state, county, and district respectively benefited and taxed for moneys expended in their own territory. *Meehan v. Shields*..... 617

TAXATION—CONTINUED.

3. TAXATION—APPORTIONMENT—TO PART OWNER—NOTICE. By Rem. & Bal. Code, § 9234, notice of application for apportionment of taxes on a tract of land, by the owner of a part, need not be given where the assessed valuation of the tract is less than $2,000. *Coleman v. Security Savings Society*..... 675

4. SAME—APPORTIONMENT—REDEMPTION—MISTAKE IN CERTIFICATE—EFFECT. Proceedings for the apportionment of taxes on a tract of land, followed by a redemption of the part of the applicant, are not affected by a mistake of the taxing officer in describing the land in the redemption certificate. *Coleman v. Security Savings Society*. 675

5. SAME—PROCEDURE FOR APPORTIONMENT—PRESUMPTIONS. Where an act for the apportionment of taxes requires the treasurer to carefully investigate and ascertain the proportionate value of the parts sought to be segregated and divide the assessment on that basis, without providing any procedure, he may adopt the procedure deemed most fitting, and will be presumed to have done his full duty, in the absence of a showing that the apportionment is unjust. *Coleman v. Security Savings Society*..... 675

6. TAXATION—TAX DEEDS—REQUISITES. A tax deed is not void on its face, where it is in the statutory form, recites the tax proceedings before the sale, and expresses the consideration in the language of the statute. *Huber v. Brown*..... 654

7. SAME—EXECUTION BY DEPUTY—VALIDITY. Under Rem. & Bal. Code, § 3939, empowering county treasurers to appoint one or more deputies, a deputy has power to execute a tax deed required by statute to be executed by the county treasurer. *Huber v. Brown*. 654

8. SAME—ACKNOWLEDGMENT. The statute does not require a tax deed to be acknowledged. *Huber v. Brown*..... 654

9. SAME—TAX DEEDS—ACTION TO SET ASIDE—LIMITATIONS. A tax deed based upon a void judgment is within the protection of the statute of limitations requiring actions to cancel a tax deed to be commenced within three years after the date of the deed. *Huber v. Brown*..... 654

10. TAXATION—DEED—ACTION TO SET ASIDE—TENDER—NECESSITY. A tender of taxes paid is sufficient to permit an action to set aside a tax deed, and need not be kept good, where the tender was not rejected because of its insufficiency, but because of contesting the title. *Craver v. Mossbach*..... 662

11. SAME—RECOVERY. Lack of evidence as to the sufficiency of a tender of taxes, where the tender had been waived, is not ground for refusing to vacate a void tax deed. *Craver v. Mossbach*... 662

12. TAXATION—ACTION TO RECOVER LANDS SOLD—LIMITATIONS. An action to quiet title to land sold for taxes, attacking the validity of the tax foreclosure, is within Rem. & Bal. Code, § 162, providing that

TAXATION—CONTINUED.

actions to set aside or cancel a tax deed or for the recovery of lands sold for delinquent taxes must be commenced within three years from and after the date of the issuance of the treasurer's deed. *Anderson v. Spokane, Portland & Seattle R. Co*..... 439

TENANCY IN COMMON:

Apportionment of tax to, see TAXATION, 3-5.

1. TENANTS IN COMMON—TRUSTS—VENDOR AND PURCHASER. Where the holder of a title to lands agrees, by a written contract, to convey a one-half interest to another, upon payment of specified sums constituting one-half of the original purchase price, they are not tenants in common, and the title holder is not a trustee for the other, their rights being fixed by the written contract. *Gasaway v. Ballin*.. 355

2. TENANCY IN COMMON—RIGHT TO RECOVERY—POSSESSION—PARTIES. A tenant in common is entitled to recover possession of the entire estate, as against every person other than the cotenant. *Craver v. Mossbach* ..... 662

TENDER:

Of rent, see LANDLORD AND TENANT, 10.
Of amount due on mortgage as condition of discharging lien, see MORTGAGES, 3, 4.
Of taxes due as condition precedent to attack on tax title, see TAXATION, 10, 11.
Of price of land, see VENDOR AND PURCHASER, 10, 11, 15.
Of performance, see VENDOR AND PURCHASER, 8, 14.

1. TENDER—NECESSITY—WAIVER. A tender is not necessary where it conclusively appears that it would not have been accepted if made. *Livieratos v. Commonwealth Security Co*..... 376

2. TENDER—DEPOSIT IN COURT—ACCEPTANCE—EFFECT. The acceptance of a deposit, unconditionally paid into court by defendant to be credited upon the account, does not operate as a settlement or end the controversy as to the balance claimed. *Kempe v. Johnson* ..... 154

TERMS:

Of office in general, see OFFICERS.

THEORY OF THE CASE:

As determining scope and extent of review, see APPEAL AND ERROR, 21.

TIDE LANDS:

See DEDICATION, 1.
Disposal of state tide lands, see PUBLIC LANDS, 3-6.

**TIMBER:**

Cutting logs, see LOGS AND LOGGING.

**TIME:**

Computation of time for appeal, see APPEAL AND ERROR, 13.
For filing case or statement of facts on appeal or error, see APPEAL AND ERROR, 18.
For application for new trial in civil actions, see NEW TRIAL, 1, 2.
For probate of will, see WILLS, 2.

**TITLE:**

Under unacknowledged instrument, see ACKNOWLEDGMENT.
Title to cemetery lands, see CEMETERIES, 1.
Operation and effect of dedication, see DEDICATION.
Acquired by condemnation proceedings, see EMINENT DOMAIN, 2.
Of lessor, see LANDLORD AND TENANT, 2.
Trial of, in unlawful detainer, see LANDLORD AND TENANT, 8.
To mineral location, see MINES AND MINERALS.
To railroad land, see PUBLIC LANDS, 1.
To maintain suit to quiet title, see QUIETING TITLE.
Of statutes, see STATUTES, 2.
Tax titles, see TAXATION, 6-11.
Sufficiency of title of vendor of land, see VENDOR AND PURCHASER, 12, 13, 16.

**TORTS:**

See LIBEL AND SLANDER.
Joinder of action in contract and tort, see ACTION.
Damages, inadequate or excessive, see DAMAGES, 4-7.
Of cities, see MUNICIPAL CORPORATIONS, 22-26.
Malpractice, see PHYSICIANS AND SURGEONS, 1.

1. TORTS—EVIDENCE—SUFFICIENCY—SEDUCTION—PLEADING—VARIANCE. Under a complaint making a general charge of seduction, the evidence shows an actionable wrong, even if not a technical seduction, and there is no fatal variance between the pleading and the proof, in the absence of a motion to make the complaint more specific, where the plaintiff's evidence showed a case of rape in the first instance, the relations were continued under a promise of protection by reason of her frame of mind produced by the first ravishment until pregnancy arose, which was avoided by abortive means provided by the defendant. *Murrilla v. Guis*..... 564

**TRADE-MARKS AND TRADE-NAMES:**

Sufficiency of title of act, see STATUTES, 2.

1. TRADE-MARKS—INFRINGEMENT—COMPLAINT—SUFFICIENCY. A complaint for the infringement of a trade-mark label is sufficient when the charging part is in the words of the statute, Rem. & Bal. Code, § 9497, and the label is identified as that of the Allied Printing

TRADE-MARKS AND TRADE-NAMES—CONTINUED,

Trades Council, adopted, used, and filed as required by law. *State v. Montgomery* ..... 192

2. TRADE-MARKS—REGISTRATION—APPLICATION. An application for registration of trade-marks to consist of the words "Typographical Union Label" or "Allied Printing Trades Council" facsimile of each being attached, is not void as being in the alternative, but is rather an application for the registration of two labels, the law not prohibiting the registration of more than one label on one application. *State v. Montgomery* ..... 192

3. SAME — REGISTRATION — EVIDENCE — CERTIFIED COPIES. Under the law making the secretary of state's attested certificate of the recording of a trade-mark proof of its adoption, and prescribing no form for the certificate, the secretary of state's certified copy of the application and label is sufficient *prima facie* proof of all acts necessary for registration, including the filing of two copies of the label required by law. *State v. Montgomery* ..... 192

4. SAME—REGISTRATION—APPLICATION. The law does not require application for the registration of a trade-mark to be made by any particular person, and it is sufficient that one application for two labor union labels, having some interests in common, was made by the president of one of the unions in the interest and for the use of the unions. *State v. Montgomery* ..... 192

TREES:

Cutting logs, see LOGS AND LOGGING.

TRIAL:

Review of rulings as dependent upon presentation of exception or objection in lower court, see APPEAL AND ERROR, 5-11.

Scope and extent of review as dependent on theory of case, see APPEAL AND ERROR, 21.

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 23-34.

Condemnation proceedings, see EMINENT DOMAIN, 17, 18.

Instructions in action against master for injuries to servant, see MASTER AND SERVANT, 2, 3, 6, 11-13, 21, 27.

Instructions in action for obstructing streets, see MUNICIPAL CORPORATIONS, 10, 11.

Motions and grounds for new trial, see NEW TRIAL.

1. TRIAL—NOTICE OF TRIAL—WAIVER OF OBJECTION—EMINENT DOMAIN. The notice of trial required by Rem. & Bal. Code, § 319, is not jurisdictional, and is waived, on the preliminary hearing in a condemnation suit, where the party made no motion to set aside the adjudication of public use, and subsequently went to trial on the question of damages, after ample time to prepare for the same. *In re Western Avenue* ..... 290

TRIAL—CONTINUED.

2. TRIAL—WAIVER OF NONSUIT—AMENDMENT TO CONFORM TO PROOF. Where a motion for nonsuit was waived by the defendant by putting in its evidence, the case will be considered on all the evidence, received without objection, and the pleadings will be deemed amended to conform to the issue presented in its entirety. *Alkire v. Myers Lumber Co*..... 300

3. TRIAL—ORDER OF PROOF. Error cannot be predicated upon the refusal to admit evidence in support of appellant's case in chief where it was offered out of order upon cross-examining the adverse party's witness on rebuttal. *Anderson v. Globe Navigation Co*..... 502

4. TRIAL—REJECTION OF DEED—APPEAL—RECORD. Upon the conditional rejection of a deed offered in evidence, the deed will be considered as in evidence on appeal, where otherwise the appellant would have been misled. *Craver v. Mossbach*..... 662

5. TRIAL—QUESTIONS OF LAW OR FACT—LAW OF OTHER STATE. It is a question of law for the court, and not one of fact for the jury, where the only evidence as to the law of another state was the opinion of an attorney of that state as to the proper legal inference to be drawn from certain decisions of the supreme court of such state. *Ongaro v. Twohy*..... 668

6. TRIAL—INSTRUCTIONS—REQUESTS. It is not error to refuse to give requested instructions covered in the general charge. *Harris v. Brown's Bay Logging Co*..... 9

7. TRIAL—INSTRUCTIONS—REQUESTS. Objection that an instruction failed to name the date for fixing the market value of land, cannot be made in the absence of any request therefor. *Tacoma v. Wetherby* ..... 295

8. TRIAL—INSTRUCTIONS—ISSUES—HARMLESS ERROR. A technically erroneous instruction purporting to state the issues, and alluding to the plaintiff's expectancy of life as if alleged in the complaint (which only alleged his age), does not require a reversal where it did not state what the life expectancy actually was. *Wiemann v. Jackman R. Co*..... 682

9. TRIAL—INSTRUCTIONS—EVIDENCE—BURDEN OF PROOF. Where there are correct general instructions as to the burden of proof and the preponderance of the evidence, it is not error to precede other instructions by the introductory clause, "If you find from the evidence" and so-forth, without repeating the previous general instructions. *Wiemann v. Jackman R. Co*..... 682

10. TRIAL—INSTRUCTIONS—COMMENT ON FACTS. An instruction stating facts that are not disputed is not prejudicial as a comment on the evidence. *Conover v. Carpenter*..... 146

11. TRIAL—MISCONDUCT OF JUDGE—COMMENT ON CREDIBILITY OF WITNESS. Upon the examination of a witness as an expert upon land

TRIAL—CONTINUED.

values, it is error for the court to remark in the presence of the jury that the witness had qualified as an expert in other hearings and was competent to give an opinion as shown thereby and by reason of his connection with a well-known real estate office for three and one-half years. *In re Western Avenue*..... 290

12. TRIAL—INSTRUCTIONS—ARGUMENT OF COUNSEL. An instruction that the jury are to "disregard the statements of the attorneys as to the value of the lands," while not commendable is not prejudicial, where it goes no further than to suggest that the statements are not to be regarded as evidence. *Tacoma v. Wetherby*..... 295

13. TRIAL—MISCONDUCT OF ATTORNEY—QUESTIONS TO SHOW INDEMNITY OF PARTY. In an action against a constable for the wrongful seizure of property under execution, it is not misconduct of the plaintiff's counsel, or prejudice warranting a new trial, that he asked the constable "why he did not obtain an indemnity bond" when he found that the plaintiff claimed the property, and "you did not obtain any security prior to your levy, did you," objections to which were sustained; as the questions did not intimate that the party was indemnified, but rather the contrary, and no prejudice was shown. *Madrona Grocery Store Co. v. Wallin*..... 136

14. TRIAL—IMPROPER QUESTIONS—PREJUDICE. No prejudice results from an improper question as to an inquiry made as to whether a man would be accepted for insurance after the removal of one kidney, which was objected to as hearsay, the objection sustained, and the question withdrawn without having been answered. *Alkire v. Myers Lumber Co.* ..... 300

**TRUSTEES:**

As parties defendant, see PARTIES, 2.

**TRUSTS:**

Conveyance in trust, see HUSBAND AND WIFE, 4.
In real estate, see TENANTS IN COMMON, 1.

1. TRUSTS—LACHES—STALE CLAIM. An action for an accounting and to enforce a trust, whereby plaintiffs' father was to hold for their benefit lands descended from their mother, is a stale claim and barred by laches, where the same was not commenced until seventeen years after the youngest plaintiff became of age and the father had died after making a different testamentary disposition of the property. *Pilcher v. Lotzgesell*..... 471

2. TRUSTS—EXPRESS TRUSTS—PAROL PROOF. Under Rem. & Bal. Code, § 8745, requiring conveyances to be by deed, an express trust in lands cannot be proved by parol testimony; and to give any standing in court, the trust must be *ex maleficio*. *Pilcher v. Lotzgesell*... 471

TRUSTS—CONTINUED.

3. TRUSTS—EXPRESS TRUST—PAROL EVIDENCE. A deed absolute in form, but in trust for the grantors, is an express trust which cannot be proved by parol evidence. *Kinney v. McCall*..... 545

4. TRUSTS—ESTABLISHMENT—EVIDENCE—SUFFICIENCY. The evidence to establish a trust must be clear and satisfactory, and is insufficient where the only witnesses were one of the original grantors and the grantee, both aged and infirm and deficient in memory, and parts of their testimony tended to establish a trust in favor of the grantor and his wife while other parts tended to establish a trust in favor of the wife and children, made more than nineteen years ago, which trust they as participants had breached at that time. *Kinney v. McCall* ..... 545

TRUTH:

As justification of libel, see LIBEL AND SLANDER.

ULTRA VIRES:

Transfer by insolvent corporation as *ultra vires*, see CORPORATIONS.
Contracts of municipalities, see MUNICIPAL CORPORATIONS, 4.

UNITED STATES:

Public lands, see PUBLIC LANDS.

UNIVERSITIES:

Sale of land by regents, see ADVERSE POSSESSION, 2.
University lands, see PUBLIC LANDS, 7.

UNLAWFUL DETAINER:

See LANDLORD AND TENANT, 8-11.

USURY:

1. USURY—ILLEGAL EXACTION. A note for $500, given as a bonus or fee for procuring a state contract at a public sale and for furnishing $960 to buy the land, for which latter sum a note with the maximum rate of interest was also taken, is usurious, under Rem. & Bal. Code, §§ 6251, 6255, especially where the value of the service was inconsiderable; since the contract was entire and part of the consideration was illegal, and a contract usurious in part is illegal as to the whole. *Inland Trading Co. v. Edgecombe*..... 257

VACATION:

Compromise and settlement, see COMPROMISE AND SETTLEMENT.
Of judgment by default, see JUDGMENT, 1.
Of receiver's sale, see RECEIVERS, 1.
Tax sale, see TAXATION, 11.

**VALUE:**

Of land appropriated for public use as measure of compensation, see EMINENT DOMAIN, 12-16.
Of land, experts, see EVIDENCE, 5.

**VARIANCE:**

See TORTS.

**VENDOR AND PURCHASER:**

Unacknowledged deed, see ACKNOWLEDGMENT.
Alteration of contract, see ALTERATION OF INSTRUMENTS, 1-3.
Compensation of broker procuring conveyance, see BROKERS.
Passing of after-acquired title, see DEEDS, 1.
Sale of community property, see HUSBAND AND WIFE, 3.
Accrual of action, see LIMITATION OF ACTIONS, 1.
Sale of state lands, see PUBLIC LANDS.
Notice by probate of will not recorded, see PROBATE.
Transfers of ownership of personal property, see SALES.
Specific performance of contract, see SPECIFIC PERFORMANCE.
Contract to sell, see TENANTS IN COMMON, 1.

1. VENDOR AND PURCHASER—BONA FIDE PURCHASER—QUITCLAIM DEED. The grantee in a quitclaim deed, for value and without notice, is a *bona fide* purchaser, within the recording acts. *Eyanson v. Waidlich* ..... 234

2. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—QUITCLAIM—RECORDING. The grantee in a quitclaim deed, for value and without notice of a prior unrecorded quitclaim deed, is a *bona fide* purchaser, with Rem. & Bal. Code, § 8781, providing that all deeds shall be recorded and shall then be valid against subsequent *bona fide* purchasers. *McDougall v. Murray* ..... 76

3. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE OF EASEMENT—ESTOPPEL. The purchaser of land subject to an easement for a logging road cannot assert an abandonment of the easement by nonuser, where, prior to his purchase, use of the easement had been resumed with the consent of the original owner. *McAdam v. Benson Logging & Lumbering Co* ..... 407

4. VENDOR AND PURCHASER—BONA FIDE PURCHASER—RECORDS—NOTICE—SECRET TRUST. The fact that recorded deeds in the chain of title to secret trustees recited only a nominal consideration, is not notice of the secret trust, and does not affect the rights of a *bona fide* purchaser for full value, where the deeds had been recorded and unquestioned for several years. *Kinney v. McCall* ..... 545

5. VENDOR AND PURCHASER—CONTRACT—FORFEITURE. The failure of a vendee to pay taxes and assessments upon the land is not ground for rescission by the vendor and forfeiture of the contract, in the absence of a statute making the tax the personal obligation of the vendor. *Olizer v. Krause* ..... 26

VENDOR AND PURCHASER—CONTINUED.

6. VENDOR AND PURCHASER—CONTRACTS—FORFEITURE—NOTICE. A contract for the sale of land, in which time is of the essence, providing that the same shall be void if the vendee fails to make payments when due, cannot be rescinded by the vendor for default in a payment where, before notice of forfeiture was given, the vendee tendered more than the amount then due on the contract. *Clizer v. Krauss* ..... 26

7. VENDOR AND PURCHASER—CONTRACTS—RESCISSION BY VENDOR. The holder of the legal title to lands may by notice abrogate a contract whereby he had agreed to convey a one-half interest to another on the payment of specified sums, where the other party violated the provisions of the contract requiring him, in the case of a sale of lots, to pay one-half of the money received to the title holder and to apply the other half upon an indebtedness secured by mortgage on the property. *Gasaway v. Ballin*..... 355

8. VENDOR AND PURCHASER—CONTRACT—RESCISSION—TENDER OF PERFORMANCE. Where time was of the essence of a contract to purchase land, and the vendee purchased and paid for only one-half of the property, his earnest money was credited on such purchase, and he stated that he did not desire to purchase the other half, and he did not comply with the contract within the time specified, but merely filed his contract of record two months after the time had expired, it was not necessary to a rescission by the vendors that they execute and tender a deed or demand performance, but the contract was at an end when the purchaser took half of the property and declined the balance. *Martin v. Pierce*..... 389

9. VENDOR AND PURCHASER—FAILURE TO CONVEY—RIGHTS OF VENDEE—LIMITATION OF ACTIONS—TRUSTS—NOTICE OF ACCRUAL. Vendors who had given a bond for a deed and had received the full purchase price, are not trustees of the legal title for the vendee so as to arrest the running of the statute of limitations, where the vendee never took possession of the property; and any action by heirs of the vendee for relief, upon the grantors' conveyance to third persons, is subject to the statute of limitations, which begins to run when the right accrues, although the heirs allege that they were without notice of their rights. *Edwards v. Beck*..... 80

10. VENDOR AND PURCHASER—RESCISSION BY VENDEE—TENDER OF PRICE—NECESSITY. Where the vendor had no title to part of the land, and was unable to procure title within the time called for by the contract, the vendee may rescind and recover purchase money paid without tender of the unpaid balance due; since a vendor does not have a reasonable time to obtain title. *Sutthoff v. Maruca*..... 102

11. VENDOR AND PURCHASER—RESCISSION BY VENDEE—TENDER OF PRICE—NECESSITY. Where the vendor's wife was insane and incapable of executing the deed, the vendee may rescind a contract for the pur-

VENDOR AND PURCHASER—CONTINUED.

chase of community property without tender of the unpaid purchase price; since a vendor does not have a reasonable time to obtain title. *Colpe v. Lindblom*..... 106

12. VENDOR AND PURCHASER—RESCISSION BY VENDEE—WAIVER—TIME FOR PERFECTING TITLE. Where it develops that a vendor's wife is insane, the vendee's request that a guardian be appointed to make the conveyances waives his right to a rescission and grants a reasonable time within which to perfect the title. *Colpe v. Lindblom* ..... 106

13. SAME—REASONABLE DILIGENCE. A vendor did not proceed with reasonable diligence in perfecting his title, so as to avoid a rescission by the vendee, where he was requested in May to secure the appointment of a guardian to make conveyance for his insane wife, the petition therefor was not filed for three months, and an order of sale not made until late in December; especially where just before the order for sale he insisted upon the vendee's taking title as it was. *Colpe v. Lindblom*..... 106

14. SAME—TENDER OF PERFORMANCE. After notice of rescission by the vendee for failure to perfect the title within a reasonable time, tender of performance by the vendor comes too late. *Colpe v. Lindblom* ..... 106

15. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—TENDER—SUFFICIENCY. A tender of the amount due on a contract for the sale of land, in order to entitle the vendee to maintain an action for specific performance, need not include the amount due for taxes and assessments on the land agreed to be paid by the vendee, although the contract calls for a warranty deed; since the vendor is not liable for the same. *Clizer v. Krauss*..... 26

16. VENDOR AND PURCHASER—MARKETABLE TITLE. A contract to convey a good marketable title, free from defects, as shown by abstract of title, is not fulfilled by a deed of land acquired during coverture, executed by the husband alone, whose domicile is not disclosed, his wife being insane and his claim to the land as separate estate not being deducible of record, as it is not free from probable litigation. *Colpe v. Lindblom*..... 106

17. VENDOR AND PURCHASER—RESCISSION BY PURCHASER—DECREE—RELEASE OF CONTRACT. Upon entering a decree for the rescission of a contract for the sale of land, the parties must be placed in *status quo*, and the court should direct the vendee to execute a release of the contract. *Colpe v. Lindblom*..... 106

18. VENDOR AND PURCHASER—CONTRACT—REJECTION BY OWNER—RECOVERY OF EARNEST MONEY. The action of the vendor in proffering a deed, with notes and mortgage for the deferred payments, which provided for attorney's fees and that the whole sum should become due on failure to pay an installment of interest, is a refusal of the

VENDOR AND PURCHASER—Continued.

contract made by the agent subject to his approval, where the agent's contract fixed the time, amount, and interest of the deferred payments without any provision for attorney's fees or maturity of the notes in case of default; hence the vendee could recover earnest money to be returned if the vendor did not approve the sale. *Bridge v. Calhoun, Denny & Ewing*..... 272

19. Vendor and Purchaser—Alteration of Contract—Rescission by Vendee—Estoppel. A contract for the sale of land cannot be rescinded by the vendee because of unauthorized alterations in the contract, where the alterations made were for his benefit and he was informed thereof and made no objection at the time. *Heinemann v. Sullivan*..... 346

20. Vendor and Purchaser—Contracts—"Prompt" Payment—Remedies of Purchaser—Refunding Price. Where a contract for the sale of lots requiring payment in monthly installments provided for forfeiture in case of default for more than sixty days, payments made within the sixty-day limit are "promptly" made, within the meaning of an agreement to refund the first six installments if the purchaser is then dissatisfied and the same have been "promptly paid." *Livieratos v. Commonwealth Security Co*..... 376

21. Vendor and Purchaser—Rescission by Vendee—Fraud. A trade of real estate may be rescinded by a vendee who took land lying at a distance without having seen it, relying upon representations, known by the vendors to be false, to the effect that 100 acres were under cultivation and 21 acres irrigated, with orchard, etc., where there were only 25 acres under cultivation and no irrigation or orchard. *Lindsay v. Davidson*..... 517

VERDICT:

Review on appeal or writ of error, see Appeal and Error, 24, 25.

VESTED RIGHTS:

Protection, see Constitutional Law.

VETERANS:

Pensions for, see Pensions.

VEINS:

See Mines and Minerals, 1.

WAIVER:

See Estoppel.

Of right to foreclosure, see Mortgages.

Damages caused by public improvements, see Municipal Corporations, 8, 12.

Of defects in complaint, see Pleading, 1, 8.

WAIVER—CONTINUED.

Of tender, see TENDER.
Of notice of trial, see TRIAL, 1.
By purchaser of rescission of contract for sale of land, see VENDOR AND PURCHASER, 12.

WARNING:

Duty of master to warn servant of danger, see MASTER AND SERVANT, 12, 18, 19, 22.

WARRANTY:

Covenants of, see COVENANTS.

WATERS AND WATER COURSES:

Right to use of shores for driving or floating logs, see LOGS AND LOGGING, 3-5.

WAYS:

Private rights of way, see EASEMENTS.
Public ways, see HIGHWAYS.
Streets, see MUNICIPAL CORPORATIONS, 7-10, 22.

WILLS:

Effect of probate on administration, see EXECUTORS AND ADMINISTRATORS, 2, 9
Failure to record probate, see RECORDS, 1.

1. WILLS—EXECUTION—PROBATE—COLLATERAL ATTACK. Probate of a will in common form cannot be collaterally attacked or set aside after the time limited therefor by law because of the fact that the will appears on its face not to have been executed in the manner required by law. *Horton v. Barto*..... 477

2. SAME—STATUTES. Under Rem. & Bal. Code, § 1307, providing for the contest of the probate of a will, within one year, on the question of the competency of the deceased, or respecting its execution, restraint, undue influence, "or any other cause affecting the validity" of the will, and § 1309, providing that the probate shall be binding if no person shall appear within the year, all contests based upon any cause affecting the validity of the will must be commenced within the time limited, after which the probate is binding upon all except persons under disability. *Horton v. Barto*..... 477

WITNESSES:

Competency of experts, see EVIDENCE, 5.
Reputation, see LEWDNESS, 1.
Absence as ground for new trial, see NEW TRIAL, 9.
Credibility, comment on, see TRIAL, 11.

1. WITNESSES—CROSS-EXAMINATION. It is not error to ask a witness upon cross-examination if he had been paid for his testimony, there

WITNESSES—CONTINUED.

being no attempt to show a settlement for liability to him arising out of the matter in suit. *Anastasakas v. International Contract Co.* ..... 453

2. WITNESSES—IMPEACHMENT—REMOTENESS—PRINCIPAL AND AGENT—EVIDENCE. Upon an issue as to whether the nominal lessee of a vessel operated it as an independent lessee or as agent for the owner, a witness who testified that the lessee owned no vessels and purported to operate vessels of the owner only, may not be impeached by the lessee's answer in an action in which it admitted ownership of a certain other vessel, where the two events were not sufficiently connected in point of time to even remotely contradict the witness. *Anderson v. Globe Navigation Co.* ..... 502

3. WITNESSES—IMPEACHMENT—INSTRUCTIONS. Under an instruction to the jury that if a witness testified falsely in one thing they should reject her testimony as to all matters wherein she is not corroborated, false testimony is not shown by an apparent contradiction between her answers to interrogatories and her testimony, where the question of contradiction depended upon the construction to be placed upon certain words, and the answers to the interrogatories were made on the advice of an attorney in the belief that they were truthful. *Murrilla v. Guis* ..... 564

**WORK AND LABOR:**

Liens for work and materials, see MECHANICS' LIENS.

**WRITS:**

See MANDAMUS.

**WRONGS:**

See TORTS.

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